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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

Nos. 704-705

MATTHEW J. CONNELLY and T. LAMAR CAUDLE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

To Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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In the
United States District Court of Missouri,
Eastern Division.

The United States of America,

Plaintiff,

- against -

Matthew J. Connolly and
T. Lamar Caudle,

Defendants.

STATEMENT UNDER OATH OF HARRY I. SCHWIMMER, taken before a Notary Public of the State of New York, at the home of the witness, 4 Peter Cooper Road, New York, New York, on the 3rd day of June, 1958, at 2:15 o'clock p. m.

Present:

Francis Adams, Esq.,

Paul B. Rava, Esq.

Mr. Adams: Mr. Schwimmer, as you know, I am here with Mr. Paul B. Rava, who is a member of the firm which is Mr. Connolly's counsel of record in this case, and I am appearing here as a colleague of Mr. Rava, and of counsel to Mr. Connolly and his firm for the purpose of taking this statement from you.

We understand that you are not now in good health.

The Witness: Yes.

Mr. Adams: And I want to make it clear to you that I want you to take all the time that you need, and I don't want to put any strain upon you. I want you to feel as relaxed and as comfortable as possible in the course of giving this statement.

Now, Mr. Schwimmer, I would ask you to take the oath from the reporter here, who is a Notary Public.

Will you administer the oath, Mr. Reporter?

HARRY I. SCHWIMMER,

having been first duly sworn by the Notary Public, was examined and testified as follows:

Mr. Adams: If you will, make a note on the record that at this point, the oath was administered by the Reporter.

May it appear upon the record that this statement is being taken in the City of New York, at 4 Peter Cooper Road, apartment 7-H, which is Mr. Schwimmer's apartment.

Examination by Mr. Adams:

Q. Will you state your full name?

A. Harry I. Schwimmer.

Q. And your address is as I have stated it on the record?

A. Yes.

Q. How long have you lived in New York?

A. About three or two years.

Q. You will recall that Mr. Rava and I came here yesterday and discussed with you the giving of a statement by you.

A. Yes.

Q. You are one of the people who were named as defendants in an indictment in the United States Court in St. Louis, Missouri, which was filed in December of 1955?

A. Yes.

Q. And you yourself are a lawyer?

A. Yes.

Q. Prior to the filing of that indictment, and as indicated in that indictment, you were the lawyer for a man named Sachs?

A. Yes, I was.

Q. You were a lawyer for him in connection with certain tax problems that confronted him?

A. Yes.

Q. And you recall that the case resulting from that indictment that I mentioned came on for trial in St. Louis in May, 1956?

A. Yes, it did.

Q. That was sometime in 1956, in May, the record shows; is that right?

A. Wait a minute——

Q. 1956, in May, is when the case came on for trial; is that right?

A. Yes.

Q. You recall that during the trial, the record shows, on May 28, 1956 you sustained a heart attack?

A. Yes.

Q. Do you recall that as a result of that heart attack a mistrial was declared as to you?

A. Yes, I do.

Mr. Adams: I think I may say here that I might not have the date of the heart attack correct. My notes indicate that the mistrial was declared on May 28, 1956, and I think the record would show that the heart attack took place a few days before that.

The Witness: Yes.

Q. Now, of course you are aware that that indictment, at least as far as you are concerned, is still pending?

A. Yes, I am.

Q. At the time that you suffered this heart attack, did you go to a hospital in St. Louis?

A. Yes, to the hospital.

Q. And were you there a few days?

A. No, about twelve or—some such date as that.

Q. In the neighborhood of twelve days; is that what you are saying?

A. Yes.

Q. Then, after a further time in St. Louis, did you return to New York?

A. Yes, I did.

Q. Did there come a time when you suffered a stroke?

A. Yes.

Q. After you had the heart attack?

A. Yes, I did.

Q. Was that in New York?

A. Yes, it was.

Q. Can you give us the approximate month and year?

A. It was in October.

Q. October of 1956?

A. Of 1956.

Q. Mr. Schwimmer, did that stroke have any effect upon your power of speech?

A. Yes, it did; it almost left me speechless.

Q. Within the past year or two have you had a loss in your family also?

A. Yes.

Mr. Adams: I am sorry to have to ask you these questions, Mr. Schwimmer, but you can see that it is necessary to do so.

The Witness: Yes.

Q. That loss was of your wife; is that correct, sir?

A. Yes.

Q. From the time that you had the heart attack, going back to the time of the trial and continuously on to the present, have you been under the care of physicians?

A. Yes, I have been.

Q. Could you give us the name of your doctor?

A. Mr. Irving Wright and Dr. Rusk.

Q. When you refer to Dr. Rusk, you mean the Dr. Rusk who was at the Bellevue Rehabilitation Center?

A. Yes.

Q. Have you been taking treatments there?

A. Yes.

Q. At that Center?

A. Yes.

Q. Have those treatments looked toward restoration of your faculties, including the faculty of speech?

A. Yes. I have mostly recovered about 50 per cent of my speech.

Q. Now, there come a time when there was some improvement in your power of speech?

A. Well, about three or four months ago I made an improvement on my speech—three or four months ago.

Mr. Adams: By the way, may I state on the record that the taking of this statement began at approximately 2:15.

Q. When you referred a moment ago, Mr. Schwimmer, to the 50 per cent improvement in your speech, you were referring to what took place within the past three or four months?

A. Yes.

Q. Prior to that time wasn't your power of speech almost completely impaired?

A. Yes, it was.

Mr. Adams: Now, Mr. Schwimmer, I want to repeat that I want you to take your time and go as slowly as you like. I do not want you to feel under any unnecessary strain in the taking of this statement.

(At this point there was a brief recess in the proceedings.)

By Mr. Adams:

Q. Mr. Schwimmer, do you know Matthew J. Connolly?

A. Yes, I do.

Q. Could you estimate when you first met him?

A. About in nineteen forty——

Q. Could we say in the forties?

A. Yes.

Q. Would it be fair to say in the early forties?

A. Yes.

Q. At that time in the course of your practice as a lawyer and also in connection with public matters did you have occasion from time to time to go to Washington?

A. Yes, I did.

Q. And some of these matters that I have referred to were what might be called pro bono publico matters; is that correct?

A. I don't know what you mean.

Q. Well, what I mean is public matters not connected with your private law practice.

A. Yes.

Q. Could you indicate to us any of the matters of that kind that took you to Washington?

A. Well, the Israel situation.

Q. Are you referring, Mr. Schwimmer, to the matter of the partition of Palestine?

A. Yes.

Q. That was a matter that concerned you as a citizen?

A. Yes.

Q. Can you now recall any other public matters that took you to Washington?

A. The German Consul.

Q. And also was there something to do with atomic energy?

A. Atomic energy. I had much to do with atomic energy.

Q. And was there some movement which I think went by the name of "Democracy and Unity" which concerned you?

A. Yes.

Q. And there were other similar matters?

A. Yes, there were.

Q. Were there also legal professional matters which took you to Washington in this period?

A. Yes, there were.

Q. Other than the representation of Mr. Sachs, can you recall any professional matters that took you to Washington?

A. Well, helium matters, much of Crown matters.

Q. What kind of company was the Crown Company?

A. That was a drug store chain.

Q. You referred, Mr. Schwimmer, to helium as being one of the matters that concerned you.

A. Yes.

Q. I'm going to show you a photostat of a paper which was marked in the trial Plaintiff's Exhibit 102, and ask you if you will look at that letter.

(Handing letter to witness.)

The Witness: I can't read the letter.

Mr. Adams: Is it difficult for you to read it?

The Witness: Yes.

Mr. Adams: Would you like me to read it to you?

The Witness: Yes, I would.

Mr. Adams: This is a photostate of a letter dated January 5, 1948. It is addressed to "Honorable Matthew J. Connolly, White House, Washington, D. C.

"Dear Matt: Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

"It was my original plan to leave for Washington sometime this week. However, unfortunately my wife's father passed away unexpectedly, and of course it will be necessary for me to stay here for a little while longer.

"I hope now to leave Kansas City about the 17th of this month, and if I may I will call or wire you as to the date when I will be in Washington.

"With fondest regards to you all, I am Sincerely, (blank), Harry I. Schwimmer."

That is typed. And on the left are the initials in capitals, "HIS:er," and at the extreme bottom left-hand page it shows "Grand Jury Exhibit 72, 7/18/55", and the initials "J. M."

By Mr. Adams:

Q. Now, do you recall that letter, Mr. Schwimmer?

A. Yes.

Q. Was that a letter that you sent to Mr. Connolly?

A. Yes, it was.

Q. The first paragraph I will read again, and it says here: "Tom informed me of your kindness in offering to help me, which I sincerely appreciate."

Now, do you remember what he is referring to?

A. The helium matter.

Q. In this letter the reference then to Mr. Connolly's kindness in offering to help was a reference to this helium matter which concerned you professionally; is that correct?

A. Yes, it was.

Q. I notice, Mr. Schwimmer, that the paragraph refers to "Tom." Would you state who "Tom" was?

A. He was a friend of mine.

Q. Can you give his name?

A. Tom Evans.

Q. Had you known him for some time?

A. Well, for about twenty or twenty-five or thirty years from now.

Q. Mr. Schwimmer, in connection with your visits to Washington, did you from time to time ask Mr. Connolly to make appointments for you?

A. Yes, I did.

Q. Did you ask him to make introductions?

A. Yes, I did.

Q. Now, in the record in this case, the evidence indicates that you asked Mr. Connolly to make appointments for you at the Bureau of Internal Revenue and the Justice Department at various times.

A. In what case?

Q. In connection with the Sachs case. Is that correct?

A. Yes, it is.

Q. Also, did you in connection with the Sachs case ask Mr. Connolly to arrange an adjournment or continuance of some conferences that were scheduled there?

A. Yes, I did. That was because of my heart attack.

Q. And Mr. Schwimmer, prior to your heart attack at the trial in St. Louis, you had had an earlier heart attack going back to 1948 or 1949; is that right?

A. Yes, I did, in 1948.

Q. Other than to request Mr. Connolly to make these appointments as you have stated, did you ever ask him to do anything else with reference to the Sachs case?

A. No, I did not.

Q. Did you at any time discuss with Mr. Connolly any of the facts involved in the Sachs case?

A. No, I did not.

Q. Did you ever go into the merits of that professional business with him at all?

A. No, I did not.

Q. Did you ever ask him in connection with the Sachs affair to intercede with anyone in the government on behalf of you or of Mr. Sachs?

A. No, never. Never did, not once.

Q. Did you at any time in connection with that case make any promises, express or implied, to Mr. Connolly in connection with it?

A. No, I didn't.

By Mr. Adams:

Q. In the course of your discussions with other officials involving the Sachs case, I suppose you mentioned that you knew Mr. Connolly?

A. Yes, I did.

Q. Was that with or without Mr. Connolly's knowledge?

A. Without his knowledge.

Q. Now, Mr. Schwimmer, in the course of your own private business—and I am making a distinction there between your private business as an individual and your practice as a lawyer—did you maintain any private record or book with relation to certain transactions?

A. No.

Q. I perhaps have not made it clear, but I was referring to what I have here as a photostatic copy of something which bears on its outer cover the word "Journal."

A. Yes.

Q. That is what I was referring to in the question.

A. Yes, that was what I maintained.

Q. That was what I intended to ask you about as the private record.

A. Yes.

Q. Now, this photostatic copy of this book appears from the record to have been marked Plaintiff's Exhibit 100 for identification.

A. Yes.

Q. I show it to you, and ask you if you recognize it as a copy of the private record to which you have referred.

A. Yes, this is a copy.

Q. Now, without going into the details of what is contained in that record, did you make a practice of putting down there items like charitable deductions, doctors' expenses, and so on?

A. Yes, I did.

Q. And was that in connection with your income tax records?

A. Yes, that was in connection with my income tax records.

Q. And the book was kept by you as a private book for income tax purposes; is that correct?

A. Yes.

Q. Mr. Schwimmer, there was marked in evidence at the trial as Exhibit 100-J for plaintiffs, part of the page in that book, page 22 a photostatic copy of which I now show you (handing to the witness).

Mr. Adams: Could I interrupt you a moment, Mr. Schwimmer, before you finish examining that?

The Witness: Yes.

By Mr. Adams:

Q. I wanted to ask you a question. This appears in your handwriting; is that correct?

A. Yes.

Q. It appears from the evidence in this case, and it was conceded, I am informed, by counsel for Mr. Connolly, on the record, that the initials there, M. C., refer to Matthew Connolly. I wanted to ask you this question: I notice that that entry reads: "Pd. out, Oil royalty, M. C. 4,200."

And I also notice at the top of this Exhibit 100-J, there appears: "Oct.—49."

Had you purchased any oil royalty in 1949, in October, for $4,200?

A. No.

Q. This entry, I take it, was made for your income tax purposes?

A. Yes.

Q. Then was the entry made sometime after October, 1949?

A. Yes, it must have been.

Q. Can you state whether it was made in November, or December, or at some later time; do you know?

A. I don't know.

Q. But do you now state that it was made sometime after October and that you cannot now state exactly when it was made?

A. Yes.

Q. Now I notice also these words in this entry: "Held in escrow to be paid out depending on whether I. Sachs case is dropped—5,800." Did that refer to $5,800?

A. Yes.

Q. Now, the word "escrow" is used there. When you made that entry what did you intend to record with reference to escrow?

A. Well, that was the business of it going back to Sachs.

Q. I want to ask you then this question: If the Sachs case was not dropped, what happened to the $5,800?

A. It goes back to Sachs.

Q. Now this part, this whole entry, was made sometime

after October, including these words that I have just been discussing?

A. Yes, those words are in November or December.

Q. Or possibly later. You said, I think, before that you couldn't say exactly, is that right?

A. Yes.

Q. If the case were dropped, what was to happen to that amount of money, according to this entry?

A. I was to keep it.

Q. There is a reference above the two entries that I have read as follows: "Shu-Stiles—$10,000." Is that Shu-Stiles the company of Mr. Sachs?

A. Yes, it is.

Q. And was that $10,000 received by you from that company on account of Mr. Sachs?

A. Yes, it was.

Q. For the year 1949, did you report that $10,000 as income to you?

A. No.

(At this point, there was a brief recess.)

Q. Now, with further reference to this Exhibit 100-J, did you at any time ever show these entries to anyone who was named in this indictment?

A. No.

Q. Did there come a time, Mr. Schwimmer, when you had a discussion with somebody about the possibility of Mr. Connolly making an investment in oil royalty?

A. Yes, I did.

Q. Whom did you discuss that with?

A. Tom Evans.

Q. And then did there come a later time when you discussed this same matter with Mr. Evans and someone else?

A. Matt Connolly.

Q. So that on the second occasion, Mr. Evans and Mr. Connolly were present?

A. Yes. And that was at the Mulbach Hotel in Kansas City. That was in the President Suite.

Q. Was there a time when you paid for an oil royalty for Mr. Connolly?

A. Yes, I did.

Q. What was the amount that was actually paid for that royalty?

A. $3,600.

Q. Did you, at the conference in the Mulbach Hotel, disclose to Mr. Connolly what the actual cost of that oil royalty had been?

A. No, I did not.

Q. What was your reason for not telling Mr. Connolly about that?

A. Well, I made the amount $750, and that is what I supposed that he would pay.

Q. Did your reasons include anything with respect to your ability to make a cheap investment?

A. Yes, that was what it was, a cheap investment for Matt Connolly. But Tom Evans knew what it actually cost.

Q. Did there come a time when you advised Mr. Connolly to sell that particular royalty?

A. About two or three years later.

Q. Actually, I think the evidence shows that the money was advanced originally by Mr. Evans, and that you eventually paid Mr. Evans back yourself; is that correct?

A. Yes, I did.

Q. Did you ever tell Mr. Connolly that you had paid

A. No, I didn't.

Q. (Continuing) —— Mr. Evans?

A. No, I didn't.

Q. Now I will ask you a somewhat general question, Mr. Schwimmer. Did you ever have any agreement of any kind with Mr. Connolly in any way relating to the Sachs case?

A. No, I didn't. I certainly did not.

Q. Mr. Schwimmer, do you plan to remain in New York?

A. Yes.

Q. And if it is necessary, will you be available for giving your deposition, or any further statement that is necessary here?

A. I don't know.

Q. Well, that, I suppose, would depend upon your health.

A. Yes.

Q. Assuming that your health is all right, is what I meant to say.

A. I don't know what I can say. My doctor would have to say that.

Mr. Adams: Yes, I understand that.

May the record show that we concluded taking the statement at 3:05.

(Whereupon, at 3:05 p. m., the statement was concluded.)

Harry I. Schwimmer.

Sworn to before me this 4th day of June, 1958.

Thomas F. Lambiase.

(Seal)

Thomas F. Lambiase
Notary Public for the State of New York
Qualified in New York County
No. 31-2239250
Commission Expires March 30, 1959

Certificate.

State of New York, } ss
County of New York. }

I hereby certify that the foregoing is a true and accurate transcript of the statements, questions and answers, made in my presence and noted by me on June 3, 1958.

Thomas F. Lambiase.

In the United States District Court of Missouri,
Eastern Division.

The United States of America,
Plaintiff,
against
Matthew J. Connelly and T. Lamar Caudle,
Defendants.

STATEMENT UNDER OATH OF HARRY I. SCHWIMMER, taken before a Notary Public of the State of New York, at the home of the witness, 4 Peter Cooper Road, New York, New York, on the 11th day of June, 1958, at 2:45 o'clock p. m.

Present:

Charles B. Caudle, Esq.;

William M. Nicholson, Esq.

Proceedings:

Mr. Caudle: Mr. Reporter, will you please let the record show that Charles B. Caudle and William M. Nicholson, attorneys, of 718 Johnston Building, Charlotte, North Carolina, make their appearances in this matter in behalf of, and at the request of, Mr. John Hooker of Nashville, Tennessee, counsel of record for T. Lamar Caudle; and that we do so with the full knowledge of, and the approval of, Mr. Morris Schenker of St. Louis, Missouri, counsel of record for Mr. Harry I. Schwimmer, in the criminal proceedings herein entitled, now pending before the United States District Court in St. Louis.

Mr. Schwimmer, I believe that you were previously interrogated by Messrs. Paul B. Rava and Francis Adams, attorneys for Mr. Matthew J. Connelly, on June 3, 1958.

as the record will show upon the filing of such interrogatories with the Federal District Court in St. Louis.

We are here today to submit some questions to you concerning your previous professional and personal association with Theron Lamar Caudle. We realize that you have been extremely ill and are at this time a very sick man, and we wish to assure you that we will exercise every effort to make this proceeding as easy as possible on you. Please take your time in answering the questions to be submitted to you, and if at any time you desire to rest for a while, please do not hesitate to so indicate.

Please let the record show that this proceeding was had in the residence of Mr. Harry I. Schwimmer at 4 Peter Cooper Road, Apartment 7-H, in New York City, at 2:50 p. m., June 11, 1958.

HARRY I. SCHWIMMER,

having been first duly sworn by the Notary Public, Thomas F. Lambinse, was examined and testified as follows:

Examination by Mr. Caudle:

Q. Mr. Schwimmer, I understand that you were previously interrogated on June 3, 1958, by Messrs. Francis Adams and Paul B. Rava, attorneys, on behalf of Mr. Matthew J. Connelly. This interrogation and the record of the proceedings in St. Louis show that during the years 1948, 1949, 1950 and 1951 you were counsel for Mr. Irving Sachs in an income tax matter before the Bureau of Internal Revenue and the Tax Division of the Justice Department in Washington. Is that correct?

A. Yes, it is.

Q. During this period did you on occasion discuss this tax matter with Theron Lamar Caudle, the then head of the Tax Division of the Department of Justice?

A. Yes, I did.

Q. At such times as you discussed this matter with Caudle, was there anyone else present?

A. Lamar Caudle, and three others besides Mr. Caudle: Smith, Cunningham, and who else I don't remember.

Q. Was there always someone present when you discussed this matter with Caudle?

A. Yes; there was.

Q. Did you on any such occasion, upon the conclusion of your conference, inquire of Caudle as to whether he knew of any good investment?

A. Yes.

Q. What, if any, information did he give you in this regard?

A. Merritt-Chapman & Scott. He gave me the name—or that they would declare a dividend, which they did.

Q. Did you act upon this information, and if so, to what extent?

A. I bought a hundred or two hundred shares of stock with that company.

Q. What were the results, that is to say, what happened with the company after that time?

A. Well, they paid a dividend, and I have still got the shares of stock.

Q. Did you later tell Caudle that you had made money on this investment?

A. Yes, I did.

Q. Did you at that time tell Caudle that you had profited to the extent that you would like to return the favor to him?

A. Yes, I did.

Q. What did Caudle say to you about his accepting favors from you? That is, did he decline your offer?

A. Yes, he did decline it. He did so.

Q. Did you later make an oil purchase in Caudle's name?

A. Yes, I did.

Q. Did Caudle know that you were negotiating the oil purchase in his behalf?

A. No, he did not.

Q. During these oil purchase negotiations did you write certain letters to a Chris Rhodes?

A. Yes, I did.

Q. Did Caudle know of these letters, and did he authorize you in any manner to make such negotiations?

A. No, he did not.

Q. The trial record shows that you, under date of April 4, 1950, wrote a letter to Caudle advising him of this purchase. Is that correct?

A. Yes, it is.

Q. Mr. Schwimmer, I will show you a letter as set forth in the brief filed in the case on appeal, in Appendix A thereof, in Section 6.

(Handing to witness.)

The Witness: I can't read the letter.

Q. You can't read the letter?

A. Can't read the letter.

Q. For your information, this letter indicated that Caudle knew of this transaction. Did he?

A. No, he did not.

Q. Also, your letter to Mr. Chris Rhodes indicated that Caudle knew of your dealings with Rhodes. Did he?

A. No, he did not.

Q. The record shows that on or about the 6th day of August, 1950 you telephoned Caudle, from Kansas City to Caudle's home in Washington, and informed him at that time of the oil purchase. Is that correct?

A. What date is that?

Q. On or about August 6th or 7th, 1950.

A. Yes, that's correct—or that is about correct.

Q. Was Caudle upset and angered by this information?

A. Well, he wasn't upset, but he let me have it. He was angry with me.

Q. Did he at that time request you to take all necessary steps to have this oil interest immediately transferred out of his name?

A. Well, he said something about that.

Q. The record of the trial shows that this property was finally transferred by Caudle and his wife to you in April, 1951. Is this correct?

A. I don't know if that is correct, but it was about that time.

Q. Did Caudle, between August 6, 1950, or thereabouts, and April 19, 1951, telephone you many times by long-distance, urging you to expedite this transfer?

A. Well, I was sick, and he telephoned me two or three or four times.

Q. Did not Caudle also speak with you personally in Miami, Florida, and again at Caudle's residence in Washington, D. C., again urging you to expedite the transfer of this oil interest?

A. Yes, he did.

Q. Mr. Schwimmer, just why did you make this purchase in Caudle's name?

A. Well, I desired to help him.

Q. Was there any reason for this desire?

A. Yes. The reason for this desire was many things that —also with Merritt-Chapman & Scott—the many other things that he had risen to help me on.

Q. Did any of the matters in which you state he helped you include the Sachs tax case?

A. No, they did not.

Q. Why did you delay so long—actually for a period of eight months—before making the transfer?

A. Because of my illness, and because of various things or other.

Q. Were these things you refer to beyond your control?

A. Yes.

Q. The record of the trial shows that there were a number of dividend checks issued in Caudle's name during the period that the title to the oil property was registered in his name. Did Caudle ever receive this money, or any part of it whatsoever?

A. No.

Q. Did Caudle ever receive anything whatsoever of value, from you, Mr. Sachs, or anyone else, to your knowledge——

A. No, he never did.

Q. (Continuing) ——in regard to any association whatsoever you may have had with him?

A. No, he never did.

Q. Was there at any time any promise of reward, either express or implied, to Caudle as a consideration for a favorable ruling in the Sachs tax case?

A. No, there never was.

Q. Was there at any time any understanding, agreement or other situation, either express or implied, between you and Caudle, or between Caudle and anyone else to your knowledge, relating to a favorable decision in the Sachs tax case?

A. No, there never was.

Q. Mr. Schwimmer, you recall that during the interrogation of you by Messrs. Adams and Rava on June 3, 1958, you were asked various questions about a ledger kept by you which in part dealt with an entry therein concerning the receipt of $10,000 from Mr. Sachs by you, and also concerning listed disbursements on other things. This entry was introduced at the trial by the government and was identified as Exhibit 100-J.

Would your answers to the same questions now be the same as those given by you during the former interrogation?

A. Yes.

Q. Do you, by reference, make those questions and answers as appear in the transcript of the former interrogation a part of this present record?

A. Yes.

Q. Did Caudle ever know anything whatsoever about your financial dealings with Mr. Sachs?

A. No, he never did.

Q. Was Caudle connected in any manner whatsoever with the entry designated as Exhibit 100-J, as aforesaid?

The Witness: What was that?

Q. Was Caudle connected in any manner whatsoever with the entry designated as Exhibit 100-J that we discussed a moment ago?

A. No, he never was.

Q. Was Caudle ever promised or paid any part of this money or any other money?

A. No, he never was.

Q. If you had not become extremely ill during the trial and had not been excluded therefrom, would you have permitted yourself to be placed under oath, and thereafter given testimony therein?

A. Yes, I would have.

Q. In that event, would you have given the Court and the jury the same information as submitted by you in this interrogatory?

A. Yes, I would have.

Q. Mr. Schwimmer, if you had not been seriously ill all the time since the trial in St. Louis, and physically unable to do so, would you have willingly submitted to this form of interrogation before June 3, 1958, the date of your first interrogation?

A. Yes, I would have.

(Whereupon, at 3:15 p. m., the statement was concluded.)

Harry I. Schwimmer.

Sworn to before me this 12th day of June, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase,
Notary Public for the State of New York,
Qualified in New York County,
No. 31-2239250,
(Seal) Commission Expires March 30, 1959.

Certificate.

State of New York,
County of New York, } ss.

I hereby certify that the foregoing is a true and accurate transcript of the statements questions and answers, made in my presence and noted by me on June 11, 1958.

Thomas F. Lambiase.

United States District Court, Eastern District of Missouri, Eastern Division.

United States of America,

Plaintiff,

v.

Matthew J. Connelly and T. Lamar Caudle,

Defendants.

No. 26,439 (2)

INTERROGATORIES propounded on behalf of defendant Matthew J. Connelly and defendant T. Lamar Caudle, and counter-interrogatories propounded on behalf of plaintiff The United States of America, to Harry I. Schwimmer, by Thomas F. Lambiase, a Notary Public of the State of New York, at No. 4 Peter Cooper Road, New York, New York, between the hours of 2:15 P. M. and 3:55 P. M. on Monday, September 29, 1958, and 2:05 P. M., and 3:40 P. M. on Tuesday, September 30, 1958, pursuant to order of the Court and the Federal Rules of Criminal Procedure.

Appearances:

Carl H. Imlay, Esq., Attorney for plaintiff The United States of America, Department of Justice, Criminal Division, Washington 25, D. C.

Alan Y. Cole, Esq., Attorney for defendant Matthew J. Connelly; 815 Fifteenth Street, N. W., Washington 5, D. C.

Tyree B. Harris, Esq., Attorney for defendant T. Lamar Caudle, 1106 Nashville Trust Building, Nashville 3, Tennessee.

Morris A. Shenker, Esq., Attorney for the witness Harry I. Schwimmer, 408 Olive Street, St. Louis 2, Missouri.

Also Present:

Dr. Walter Palmer, Associate of Dr. Irving S. Wright, 450 East 69th Street, New York, N. Y.

Mrs. Jacquelyn Kanter, Daughter of the witness, 4 Peter Cooper Road, New York, N. Y.

Proceedings:

Answers and deposition of Harry I. Schwimmer to the accompanying interrogatories on behalf of defendants Matthew J. Connelly and T. Lamar Caudle, and counter-interrogatories on behalf of plaintiff The United States of America, propounded to him in the above-styled and numbered cause by Thomas F. Lambiase, a Notary Public in and for the State of New York at No. 4 Peter Cooper Road, in the City, County and State of New York on Monday, September 29, 1958, between the hours of 2:15 P. M. and 3:55 P. M., and on Tuesday, September 30, 1958, between the hours of 2:05 P. M. and 3:40 P. M., pursuant to order of the Court and the Federal Rules of Criminal Procedure.

HARRY I. SCHWIMMER,

No. 4 Peter Cooper Road, New York, New York, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in answer to

the interrogatories and counter-interrogatories as hereinafter indicated, deposes and says as follows:

Interrogatories on behalf of defendant Matthew J. Connelly.

1st Interrogatory: Please state your name and address?

Answer: Harry I. Schwimmer, 4 Peter Cooper Road, New York City, New York.

2nd Interrogatory: Were you one of the defendants named in an indictment along with Matthew J. Connelly and T. Lamar Caudle in the United States District Court in St. Louis, Missouri, which was filed on December 1, 1955?

Answer: Yes.

3rd Interrogatory: Prior to the indictment were you the attorney for Irving Sachs in a case involving a charge of income tax evasion?

Answer: Yes, I was.

4th Interrogatory: Was the case in which you were a defendant with Connelly and Caudle called for trial in May of 1956?

Answer: Yes, it was.

5th Interrogatory: Was a mistrial declared as to you during the trial on account of a heart attack you suffered at the time?

Answer: Yes, it was.

6th Interrogatory: Are you aware that the same indictment is still pending against you on this date?

Answer: Yes—yes, it is.

7th Interrogatory: Over what period of time have you known Matthew J. Connelly?

Answer: Oh, about 1944—Is that right?—1944.

8th Interrogatory: In the course of your law practice and while Mr. Connelly was appointment secretary to the President of the United States did you have occasion to be in Washington from time to time on professional matters?

Answer: Yes, I was.

9th Interrogatory: And during the same period did you have non-professional matters that required your presence in Washington?

Answer: Yes. Yes, I was.

10th Interrogatory: Describe the non-professional matters that required your presence in Washington to the best of your recollection?

Answer: Well, I cannot answer this very well without looking at my files; but there was the helium matter, and the State of Israel matter and the German Consul matter. And many of these things that could—Many of these things could be ascertained by my files.

11th Interrogatory: Did you make contact with Matthew J. Connelly in connection with any of the matters referred to in Interrogatory 10?

Answer: Yes, sir.

12th Interrogatory: For what purpose?

Answer: Well, to help me on these matters.

13th Interrogatory: During the period described in Interrogatory 8 were you in Washington with reference to the Sachs tax case?

Answer: Yes, I was.

14th Interrogatory: Describe the professional matters in addition to the Sachs case that required your presence in Washington during the same period to the best of your recollection?

Answer: Well, the Israel matter, and maybe the helium matter—all of those things were in my purview of law.

15th Interrogatory: Did you make contact with Matthew J. Connelly in connection with any of such professional matters, including the Sachs case?

Answer: Well, two or three times I got in touch with Matt Connelly, but he did not know what the Sachs matter was, except that he would tell me two or three times, that is all.

16th Interrogatory: For what purpose?

Answer: The Sachs case, he just called once, Mr. Oliphant, and twice—I think so—he must have called Caudle. That is all. He just called them in making an appointment for me.

17th Interrogatory: Attached hereto is a photostatic copy of a letter which was previously marked and identified as Plaintiff's Exhibit 102 which reads as follows:

"January 5, 1948

Hon. Matthew J. Connelly
White House
Washington, D. C.

Dear Matt:

Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

It was my original plan to leave for Washington some time this week. However, unfortunately my wife's father passed away unexpectedly, and, of course, it will be necessary for me to stay here for a little while longer.

I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date when I will be in Washington.

With fondest regards to you all, I am

Sincerely,

Harry I. Schwimmer.

HIS:er"

Do you recall having written that letter to Mr. Connelly?

Answer: Yes, I did. And that was in regard to the helium matter, that is all.

(Photostatic copy of Plaintiff's Exhibit 102 attached hereto as Appendix C, Interrogatory 17, Matthew J. Connelly.)

18th Interrogatory: Referring particular to the first paragraph of that letter which reads:

"Tom informed me of your kindness in offering to help me, which I sincerely appreciate."

Please identify the person who is referred to as Tom?

Answer: Tom Evans.

19th Interrogatory: State how long you had known him and what connection you had with him, if any?

The Witness: Who?

(Discussion off the record.

It was agreed among all counsel present that the person referred to as "him" in the 19th interrogatory was Tom Evans.)

Answer: Well, from 1939—1939, or some such date as that—I used to represent him, as legal counsel.

20th Interrogatory: What connection, if any, did he have with the Sachs tax case?

Answer: None whatsoever.

21st Interrogatory: What is it to which you refer when you state to Mr. Connelly in the letter identified as Plaintiff's Exhibit 102 that "Tom informed me of your kindness in offering to help me, ' '"?

Answer: That was the helium matter.

22nd Interrogatory: Did you ask Mr. Connelly to arrange appointments for you in connection with the Sachs case?

The Witness: What was that?

(22nd interrogatory was repeated to the witness.)

The Witness: I can't hear you—or I can't understand you.

(22nd interrogatory was repeated to the witness.)

Answer: Yes; I think it was only twice, or three times, that he helped me getting an appointment.

23rd Interrogatory: If your answer to Interrogatory 22 is in the affirmative, with whom?

Answer: Once with Mr. Oliphant, and two times with Mr. Candle—or that's at least my memory of that situation.

24th Interrogatory: At any time, did you ask Mr. Connelly to arrange to postpone any conference set up on the Sachs case?

Answer: Yes, I did. I was sick at that time, and I was in California flat on my back, and I called Mr. Connelly to ask him if he can arrange an appointment or arrange an appointment other than that day.

25th Interrogatory: Did you have any conversation about the details of the Sachs case with Mr. Connelly?

Answer: None whatsoever.

26th Interrogatory: If your answer to Interrogatory 25 is in the affirmative, relate any such conversation.

The Witness: Read that sentence over again.

(26th interrogatory was repeated to the witness.)

(25th interrogatory was repeated to the witness.)

Answer: None at all.

27th Interrogatory: Attached hereto is a photostatic copy of an exhibit which has been previously marked for identification as Plaintiff's Exhibit 100-J. Is the handwriting that appears thereon yours?

(Photostatic copy of Plaintiff's Exhibit 100-J, attached hereto as Appendix A.

27th Interrogatory of Matthew J. Connelly, handed to the witness.)

Answer: Yes, this is mine.

28th Interrogatory: If it is your handwriting, was this writing made in a record book of some kind belonging to you?

Answer: Yes, it was. It was for income tax procedure.

29th Interrogatory: What was the purpose of keeping such a record?

Answer: Income tax procedure.

30th Interrogatory: Please notice that at the top of the exhibit appears "Oct-49". Also below, there is the entry "Pd out Oil Royalty M. C. 4200." Had you purchased any oil royalty in October of 1949 for $4200?

Answer: No, I did not.

31st Interrogatory: Was the entry "Pd out Oil Royalty M. C. 4200" made before, during, or after the month of October, 1949?

Answer: Yes, it was. It was made after that period of October, 1949.

32nd Interrogatory: If you can be more definite as to the time, will you so state?

Answer: No, I can't. It was—No, I can't.

33rd Interrogatory: Referring then to the entry "Held in escrow to be paid out depending on whether I. Sachs case is dropped 5,800." Please state for whom was the $5800 held in escrow and under what conditions was it to be paid out?

The Witness: Read that sentence again.

(33rd interrogatory repeated to the witness.)

Answer: To me, after the Sachs case was dropped.

34th Interrogatory: Did you retain as your own property any or all of the $5800 referred to above?

Answer: Yes, I did.

35th Interrogatory: If your answer to Interrogatory 34 is affirmative, please state how much you retained.

The Witness: Read that over again.

(35th interrogatory repeated to the witness.)

Answer: Five thousand eight hundred dollars—No, I didn't. The amount came to, at the close of the year

(Witness made calculation on paper.)

Answer: (continuing) Six hundred and four hundred dollars—Six hundred and four hundred dollars.

The Witness: Is that true?

Answer: (continuing) Sixty-four hundred dollars—that is what I mean, sixty-four hundred dollars.

(Discussion off the record.)

Mr. Imlay: Let the record show that after colloquy between counsel Mr. Schwimmer said, "Sixty-four hundred dollars."

(Sheet of paper with calculation made by the witness attached hereto as Appendix B, Interrogatory 35, Matthew J. Connelly.)

36th Interrogatory: Did you ever report as income on your Federal return any part or all of the $10,000.00 referred to on Exhibit 100-J?

Answer: I don't know. I don't know whether I did or did not.

37th Interrogatory: If your answer to Interrogatory 36 is in the affirmative, how much, and in what year?

Answer: I don't know at all.

38th Interrogatory: Referring now to all the entries on Exhibit 100-J, did you ever show them or any of them to Mr. Connelly or anyone else named in this indictment?

Answer: No, I never did.

(At this point the witness requested a brief recess. A recess of approximately five minutes was taken.)

39th Interrogatory: Did there come a time when you did purchase an oil royalty for Matthew J. Connelly?

Answer: Yes, I did.

40th Interrogatory: If so, when?

Answer: About December 30 of that year.

41st Interrogatory: If so, what did you pay for it?

Answer: Thirty-six hundred dollars.

42nd Interrogatory: Did you have any conversation with Mr. Connelly about the cost of such oil royalty?

Answer: No, I didn't.

43rd Interrogatory: If your answer to Interrogatory 42 is in the affirmative, what did you tell Mr. Connelly about the cost of such oil royalty?

Answer: Seven hundred dollars, I told him.

44th Interrogatory: Did you at any time prior to the indictment disclose to Mr. Connelly what had been paid by you for the oil royalty?

Answer: No, I didn't.

45th Interrogatory: Did Tom Evans ever to your knowledge lend the money to Mr. Connelly to purchase the oil royalty?

Answer: Yes, he did.

46th Interrogatory: If your answer to Interrogatory 45 is in the affirmative, did you reimburse Mr. Evans the money that Mr. Connelly had borrowed?

Answer: Yes, I did.

47th Interrogatory: If so, did you tell Mr. Connelly that you had done so?

Answer: No, I did not.

48th Interrogatory: Did there come a time when you advised Mr. Connelly to sell that same oil royalty?

Answer: Yes, I did.

49th Interrogatory: If so, what price was he paid for it and who purchased it?

Answer: He was paid, I believe, eighteen hundred dollars—Is that right?—That's right.

And who purchased it? My daughter purchased it.

50th Interrogatory: Did you disclose to Mr. Connelly who it was that purchased this oil royalty from him?

Answer: No, I didn't.

Interrogatories on behalf of defendant T. Lamar Caudle:

1st Interrogatory: State whether or not during the years 1948, 1949, 1950 and 1951 you were counsel for

Irving Sachs in an income tax matter before the Bureau of Internal Revenue and the Tax Division of the Department of Justice in Washington.

Answer: Yes, I was.

2nd Interrogatory: During this period did you on occasions discuss this tax matter with the defendant, Theron Lamar Caudle; who was then the Assistant Attorney General of the United States, in charge of the Tax Division of the Department of Justice?

Answer: Yes, I did many times. Too many times; I cannot remember.

3rd Interrogatory: At all such times as you discussed this matter with Caudle was there someone else present? If so, who?

Answer: Well, Mr. Smith—I don't know who was the others, but——

The Witness: Tell me some others, will you, so I can remember.

4th Interrogatory: Did you on any occasion inquire of Caudle about investments?

Answer: Yes, I did.

5th Interrogatory: Did he give you any information in this respect?

Answer: Merritt-Chapman & Scott, and they had—I bought stock, 200 shares. Then they declared a dividend, about a hundred per cent dividend, or thereabouts.

6th Interrogatory: Did you act upon this information and if so in what manner?

Answer: I bought the stock.

7th Interrogatory: Did you have any conversations about investments you desired to make for Caudle? If so, what was said?

Answer: Well, he didn't advise me what to do. He said, "Nothing doing."

8th Interrogatory: Did you later make the purchase of an oil royalty in Caudle's name?

Answer: Yes, I did, and he didn't know what it was for.

9th Interrogatory: Did you tell, or otherwise inform, Caudle that you were negotiating the oil purchase in his behalf?

Answer: No, I didn't.

10th Interrogatory: During these oil negotiations did you write certain letters to one Chris Rhodes?

Answer: Yes, I did.

11th Interrogatory: Did you tell, or otherwise, inform, Caudle of these letters and did he authorize you in any manner to enter into these negotiations?

Answer: No, he didn't.

12th Interrogatory: The records show that you wrote a letter under date of August 4, 1950 to Caudle advising him that you had purchased an oil royalty in his name or in his behalf. Did you write such a letter?

Answer: Yes, I did.

13th Interrogatory: Had you told or otherwise informed Caudle of the transaction before writing your letter of August 4, 1950?

Answer: I don't know if I did, but I think I called him up and told him about the matter, long-distance.

14th Interrogatory: Did you tell or otherwise, inform Caudle of your dealings with Rhodes?

Answer: No, I never did.

15th Interrogatory: State whether or not on or about the 6th day of August, 1950 you telephoned Caudle from Kansas City at his residence in Washington regarding the purchase of an oil royalty.

Answer: Yes, I did. I think it was about that date.

16th Interrogatory: What was the conversation in the above mentioned telephone call?

Answer: Well—I told him about that oil royalty, and he said I shouldn't have done it. He also said he was angry with me for having done it.

17th Interrogatory: State whether or not this oil roy-

alty was transferred to you some time in April, 1951 or thereabouts.

Answer: Yes; I've still got it. I still have got it. It paid only—it paid around sixty dollars a month, and now it pays only seventeen dollars a month; and it paid that way every month from December—No, from—Well, it paid that way for all these months.

18th Interrogatory: State whether or not between August 6, 1950, or thereabouts——

The Witness: Wait a minute, what is the date?

State whether or not between August 6, 1950 or thereabouts and April 19, 1951 Candle telephoned you by long distance regarding the oil royalty in his name. If so, what was said?

Answer: Well, he didn't like it. He authorized me to get it back into my name. And I was sick and I just couldn't do it.

19th Interrogatory: State whether or not Candle talked to you in Miami, Florida and again at his residence in Washington, D. C. about the oil royalty in his name? And if so, when, and what was said?

Answer: Well, he told me to get it out of his name and back into mine, or somebody else he did not know; but he did not want to take it and keep it. That's what it was, he did not want to take it and keep it.

20th Interrogatory: Was there a delay in transferring the oil royalty out of Candle's name?

Answer: Yes, there was.

21st Interrogatory: If your answer to the last interrogatory is "yes", why?

The Witness: What is it you are saying?

(Interrogatory No. 21 repeated to the witness.)

The Witness: Repeat that question.

(Interrogatory No. 21 repeated to the witness.)

Answer: Well, he just didn't want to keep it. I was sick, and—I was sick, that was all.

22nd Interrogatory: Did Caudle receive any part of the proceeds of any of the dividend checks which were issued in his name?

Answer: No.

23rd Interrogatory: Did Caudle ever receive anything of value from you in connection with the Sachs case or in regard to any association which you may have had with him?

Answer: Nothing, nothing at all.

24th Interrogatory: State whether or not to your knowledge Caudle ever received any money or anything of value from Sachs or anyone else in connection with the Sachs case.

Answer: No, never, nothing at all.

25th Interrogatory: State whether or not you ever made any promise of reward either express or implied to Caudle as a consideration to him for a favorable ruling in the Sachs tax case.

Answer: No, nothing.

26th Interrogatory: Exhibit 100J shows the receipt by you of the sum of $10,000.00 from Sachs. Did Caudle receive any part of this money from you or from anyone else to your knowledge?

Answer: No, he never did.

27th Interrogatory: Exhibit 100J in this case shows that you were to hold $5,800.00 in escrow until the Sachs case was dropped. Did Caudle receive any part of this $5,800.00 from you or from anyone else to your knowledge?

Answer: No, he never did. No, he never did.

28th Interrogatory: Who received the $5,800.00 referred to in Exhibit 100J as being held by you in escrow?

Answer: I did.

29th Interrogatory: Did Caudle as far as you know have any knowledge of your financial arrangements with Sachs?

Answer: No, he never did.

30th Interrogatory: As far as you know, did Caudle

know of the entries that you made that appear in Exhibit 100J?

Answer: No, he never did.

Counter-Interrogatories on Behalf of Plaintiff The United States of America.

1st Interrogatory: Are you now willing to give any testimony you may have concerning anything material to the case against Matthew Connelly and T. Lamar Caudle, and to answer questions asked of you on behalf of the federal government?

Answer: Yes, I am.

2nd Interrogatory: Do you understand that although you are testifying as a witness today, any testimony you may give can be used against you?

Answer: I refer to the Fifth Amendment.

(Discussion off the record.)

The Witness: I want to proceed.

Mr. Imlay: He says he wants to proceed. And you are willing that he proceed?

Mr. Shenker: Yes.

Mr. Imlay: Regardless of any rights he may have under the Fifth Amendment?

Mr. Shenker: I haven't understood him to say that he doesn't want to proceed.

The Witness: No, I want to proceed.

3rd Interrogatory: Have you prior to the taking of these interrogatories read or had read to you, or been informed in any way as to any of the questions asked in this proceeding, or as to any of the answers you have given, are giving, or will give?

Answer: Yes, I have.

4th Interrogatory: If so state who furnished you with the questions, or who you discussed the questions and your answers with.

Answer: Well, Mr. Candle himself—that's Candle's brother—and Mr.——

The Witness: (To Mrs. Kantor) Write out that name.

Mrs. Kanter: Is that all right? Do you mean Mr. Adams?

Mr. Imlay: Let the record show that Mrs. Kanter suggested Mr. Adams' name.

Answer: (continuing) Yes, Adams, yes. And Mr. Nichols.

The Witness: (To the Notary Public) I don't know what you—I can't tell you what the spelling is. I can't read, or I can't spell or I can't write. But I can talk—a bit.

5th Interrogatory: When did you go to California in 1958, Mr. Schwimmer?

Answer: 1958, I went to California in December—in March—No; in—in July. And I came back in September 20.

6th Interrogatory: What was the address of the place you stayed?

Answer: Ambassador Hotel.

7th Interrogatory: Did you have the permission of a doctor to make the trip, and if so, what doctor or doctors and how long have they been attending you?

Answer: Oh, I had Dr. Wright's statement before I left, and he was attending me (since) in—1953.

8th Interrogatory: When and where did you first meet Irving Sachs?

Answer: Well, I went to Mr. Sheffrey's office. That's the first time I met him.

Mr. Sheffrey was an attorney in Kansas City.

9th Interrogatory: What was the occupation of Irving Sachs?

Answer: Well, he was a shoe manufacturer.

10th Interrogatory: Were you retained by Irving Sachs as an attorney, and, if so, when and in what type of case?

Answer: A tax case, from the very—No, it wasn't the very beginning, it was——

Well, a tax case.

11th Interrogatory: Had you ever handled a tax case before being employed by Irving Sachs?

Answer: No, I never was. That was the first time he got in trouble.

12th Interrogatory: What years were involved in the Sachs case?

Answer: 1948, and to 1952.

13th Interrogatory: Who is Louis Sachs?

Answer: I don't know, but I think he was his brother.

14th Interrogatory: Who is Benjamin L. Shifrin and what was your association with him?

Answer: Well, we both were associated together in the Sachs case.

15th Interrogatory: Who is Sidney Cohen and how, if ever, did you meet him?

Answer: I met him once. I think it was in St. Louis.

16th Interrogatory: Who is Frank W. Lohn and what was your association with him?

Answer: I don't know what—was I associated with that man? I don't know.

17th Interrogatory: Who is Frederick M. Seltzer and what was your association with him?

Answer: Well, he was Criminal Examiner for Kansas City.

(Interrogatory No. 17 repeated to the witness.)

Answer: (continuing) Well, he handled this case, from Kansas City.

18th Interrogatory: Who is Joseph M. Struett, and when did you meet him?

Answer: Well, he is from Chicago; and we went up there—Sheffrey and myself went up there, to meet him.

19th Interrogatory: Who is E. Riley Campbell and where and under what circumstances did you meet him?

Answer: Well, he was a Washington lawyer, and he was in Mr. Oliphant's office.

20th Interrogatory: Do you know Mr. Charles Oliphant?

Answer: Yes, I do.

21st Interrogatory: State where and under what circumstances you met him and what his occupation was at that time.

Answer: I met him in regard to a K. C. M. O. matter.

The Witness: That's spelled—I don't know how you spell it, but I think—Well, I don't know. K. C. M. O.

Answer (continuing) I used to represent that firm.

22nd Interrogatory: State where and under what circumstances you met Mr. George J. Schoeneman, and who introduced you to him.

Answer: I met him in Washington, and Mr. Connelly introduced me to him.

23rd Interrogatory: Do you know David L. Sheffrey, and if so, explain who he is and how you were associated with him.

Answer: Well, David Sheffrey was my co-counsel in the Irving Sachs matter.

24th Interrogatory: Directing your attention to December 27, 1947, do you remember a conference you had with Mr. Sheffrey and Mr. Shifrin concerning the Sachs case?

Answer: Mr. Sheffrey, Mr. Shifrin, and Irving Sachs and I were together, and discussing the Sachs case.

25th Interrogatory: If you do remember, state what its purpose was, what was discussed and where it was held.

Answer: Well, in Mr. Sheffrey's office, and—I don't know the—the litigants. Well, the litigants' proposals—that's all I can say.

26th Interrogatory: State whether or not you agreed with your co-counsel in the Sachs case when you were retained that you would bill the client when the work was finally concluded.

Answer: Yes, I was. I was—I would bill them for me, and they would bill them for the others.

27th Interrogatory: Did you receive $1,350 from Slu Stiles, Inc., by check dated January 2, 1948, Pl. Ex. 21 (a), five days after being retained in the Sachs case, and, if so, what was it for?

Answer: For a retainer, I do believe.

28th Interrogatory: Did you receive a letter dated February 17, 1948 from Mr. Shifrin in which he indicated that attorneys' fees were to be paid to you only when the Sachs case was "finally consummated"? Plaintiff Exhibit 8-I to be attached.

Answer: I didn't.

Mr. Shenker: The way I understood it, at least, was that the exhibit would be available and that the reporter would read the exhibit, rather than just ask that.

Is that your understanding or not?

Mr. Imlay: My understanding was that we would have them here in support of the particular question asked. If you want copies of these, affixed to it—I suppose I could have copies made.

Mr. Harris: Couldn't the witness see it before he answers it?

Mr. Shenker: Let the reporter read the exhibit, because the witness cannot read. It's very difficult. He couldn't read that type of stuff at all. The reporter ought to read the exhibit to him, and then the witness could answer in line with the question.

Mr. Imlay: That would involve reading unrelated matters here.

Mr. Shenker: That's what the purpose of it was.

Mr. Imlay: I'm not opposing the method of reading the letter. But at the same time, that will, of course, run into some time.

Mr. Shenker: Either show him the letter—But he says he can't read very well.

Mr. Imlay: He has testified that he can't read. And this letter, of course, is not under his hand so I thought——

The Witness: I do not remember ever receiving that letter. So go on to the next question.

Mr. Imlay: I am just trying to work something out here. Is everyone agreed that you want the exhibits read into the record?

Mr. Shenker: I think they should be—not necessarily read into the record, but the exhibit should be read to the witness, and the reporter should then show that he read the exhibit.

The purpose, as I understand it—when I was in court I didn't stay through the entire proceedings, but one of the objections that were raised by Mr. Rava was that they took excerpts of documents that go back over years; and your associate represented the Government at the time, and thought also, as I recall it, that it would only be fair that the document should be made a part of the interrogatories.

Mr. Imlay: These are all in evidence out there in the court for the Judge to look at in this proceeding. This would just involve—As a matter of fact, I tried to get something for Mr. Cole, you know, a copy made for Mr. Cole. But it's easier to——

Mr. Shenker: Let me see if I don't have a copy of the proceedings, what the Judge said.

Mr. Harris: I have got that here (handing to Mr. Shenker). I think certainly if the witness wants it read to him it ought to be read.

Mr. Imlay: The Clerk's memorandum of what was said didn't include that. But I will certainly permit that to be read. Some of them that are attached are not for his identification.

Mr. Shenker: It isn't a question of identification. It seems unfair to ask a witness if he received a letter on a certain date, or to pick out one sentence from a letter——

Mr. Imlay: Let me just hand you this, and then the reporter can read that letter.

Mr. Shenker: That's right. And I don't think that he has to put it in the record, but if the record shows that he reads it, then the record should show that he read it to the witness.

Mr. Imlay: And cite the exhibit, so the record will refer to it.

Mr. Shenker: That's correct, in connection with that question, that's correct.

(The Notary Public read Plaintiff's Exhibit 8 (i), a photostatic copy of a letter on the letterhead of Shifrin & Shifrin, attorneys and counselors at law, 811 Olive Street, St. Louis, Missouri, dated February 17, 1948, to Harry I. Schwimmer, David L. Sheffrey, from Ben L. Shifrin.)

Answer: (continuing) Yes, I received that letter. And then it was agreed upon to go beyond that letter. That was the very essence of it.

29th Interrogatory: If so, had you, or anyone to your knowledge informed Mr. Shifrin of the $1,350 already paid you?

Answer: Well, I can't remember that. But that had to be in my files.

30th Interrogatory: You have already been shown a letter, Plaintiff's Exhibit 102, in the first paragraph of which you say:

Dear Matt: Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

Who is the Matt referred to?

Answer: Matt Connelly.

31st Interrogatory: The evidence shows that you were retained in the Sachs case on December 27, 1947 and that you sent this letter referring to an offer from "Matt" on January 5, 1948. Is that your understanding of what transpired?

Answer: Yes, it was.

32nd Interrogatory: To what were you referring when you said "offering to help me"?

Answer: The helium matter.

33rd Interrogatory: In the last paragraph of the same letter (Plaintiff's Exhibit 102) you say "I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date that I will be in Washington". Why were you coming to Washington?

Answer: I don't know.

34th Interrogatory: Did you come to Washington on or about the 17th of January, 1948?

Answer: I don't know.

35th Interrogatory: What did you do in Washington on that occasion?

Answer: Well, I don't know. I simply don't know what I did or what I didn't do.

36th Interrogatory: Did you see Mr. Oliphant on that occasion, and if so, what did he tell you?

Answer: Well, he may have seen me or he may have not, I don't know.

37th Interrogatory: Who, if anyone arranged your meeting with Mr. Oliphant, and who introduced you to him?

Answer: I think it was Matt Connelly, but I don't know who it was.

38th Interrogatory: Did you call Mr. Oliphant on the telephone on January 22, 1948 while in Washington to inquire about the Sachs case?

Answer: Yes, and no. I could not answer that in a— I don't know.

39th Interrogatory: If you did call Mr. Oliphant, what did he tell you on that occasion?

Answer: Well, we had a hearing on that occasion or some other occasion.

40th Interrogatory: On this trip to Washington did you meet with the Commissioner of Internal Revenue, George J. Schoeneman?

Answer: Well, about that time. And—Wait a minute—The Commissioner of Internal Revenue called Mr. Oliphant that time.

41st Interrogatory: If you did, who arranged for you to see him?

Answer: I think—and I may be mistaken—but I think it was the Commissioner of Internal Revenue.

(Interrogatories No. 40 and 41 were repeated to the witness.)

The Witness: The Commissioner of Internal Revenue.

42nd Interrogatory: Did you have an appointment on another occasion to see Mr. Schoeneman, and, if so, who arranged for that visit?

Answer: Mr. Schoeneman—no, no, I never have. One appointment with him.

(Whereupon, at 3:55 P. M., on the advice of Dr. Palmer, the propounding of the interrogatories was adjourned until Tuesday, September 30, 1958, at 2:00 P. M. at the same place. The following colloquy among counsel took place:)

Mr. Shenker: I should like—prior to the opportunity for anyone to discuss this matter with Mr. Schwimmer, and in the presence of all the parties here, and with no private conferences or conversations or discussions with Mr. Schwimmer—I should like to ask Mr. Schwimmer to follow me.

Mr. Schwimmer, in answer to the plaintiff's Interrogatory No. 3, which interrogatory is as follows:

"Have you prior to the taking of these interrogatories read or had read to you, or been informed in any way as to any of the questions asked in this proceeding, or as to any of the answers you have given, are giving, or will give?" Your answer was, "Yes, I have."

And then, to plaintiff's Interrogatory No. 4—"If so, state who furnished you with the questions, who you discussed

the questions and your answers with"—your answer was, "Caudle's brother, and Mr."—and then you hesitated about the name and the name of "Adams" was supplied to you.

The Witness: Yes.

Mr. Shenker: And then, as I recall, I believe you also mentioned a Mr. Nichols.

Now, in connection with those I should like to ask you—and also, you said that Mr. Caudle, I think, himself—I will ask you, sir: When did you last talk to Mr. Caudle?

The Witness: I talked to him on May 7th—May, 1958.

Mr. Shenker: All right. Now, when did you last talk to Mr. Adams?

The Witness: That was the same date.

Mr. Shenker: The same date. And when did you last talk to Mr. Caudle's brother?

The Witness: The same date.

Mr. Shenker: That's all in May of 1958?

The Witness: Yes.

Mr. Shenker: And when did you last talk to Mr. Nichols?

The Witness: In May of the same year.

Mr. Shenker: Also in May of 1958?

The Witness: Yes.

Mr. Shenker: Is that the last time that you discussed anything with any of those gentlemen pertaining to the testimony that you are to give?

The Witness: Yes, it was.

Mr. Shenker: Now, I will ask you to state if anyone has shown you any of the interrogatories prior to today—the exact questions or the interrogatories which you are answering today.

The Witness: Nobody.

Mr. Shenker: Has anyone read to you any of those interrogatories?

The Witness: Nobody.

Mr. Shenker: And has anyone discussed with you any specific questions in any of the interrogatories, whether Government interrogatories, Mr. Connelly's interrogatories or Mr. Caudle's interrogatories?

The Witness: No, not at all.

Mr. Shenker: Not at all. Then your answer that you gave at the beginning of these interrogatories pertains to discussions that you had when your original affidavit was taken; is that correct?

The Witness: Yes.

Mr. Shenker: Which was way back in May of 1958?

The Witness: Yes.

Mr. Shenker: I just wanted to clear that up, and the record ought to show it now before we adjourn.

Mr. Imlay: I want to say just one thing. I want to make sure no attempt is made to rehabilitate the witness or to reconstruct any of the answers given on rereading.

Mr. Shenker: No one has the answers.

Mr. Imlay: I'm talking about when the questions and answers are made up.

Mr. Shenker: I'm sorry, I didn't understand you. My understanding is that the reporter does not release these interrogatories with the answers until he reads them to Mr. Schwimmer, and then he takes down any suggestion he has, if any, and then has him sign before filing it in court. That's my understanding.

Wasn't that your understanding of the ground rules, that the answers, when they are made and when they are finally concluded—the reporter doesn't give them to any of the parties, but sends them to the court?

Mr. Imlay: That's right, right directly to the Court.

Mr. Shenker: That was my understanding.

(Whereupon at 4:05 P. M. the proceedings were adjourned until Tuesday, September 30, 1958, at 2:00 P. M. at the same place.)

Tuesday, September 30, 1958.

2:05 P. M.

HARRY I. SCHWIMMER,

having been previously duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in answer to the interrogatories and counter-interrogatories, as hereinafter indicated, further deposes and says as follows:

Counter-Interrogatories on Behalf of Plaintiff, The United States of America (Continued):

43rd Interrogatory: Did you write a letter on January 28, 1948, on your return from Washington and say to Mr. Connelly: I want to thank you, Matt, for the privilege of being with you and the courtesies extended. * * * Plaintiff's Exhibit 111 to be attached.

Mr. Shenker: Would you read that letter to him, please?

(Plaintiff's Exhibit 111 was read by the Notary Public to the witness.)

Answer: I don't know if I wrote it, but I assume that I did.

44th Interrogatory: Is it not a fact that you were retained in the Sachs case in the last week in December, 1947?

Answer: Yes.

45th Interrogatory: Were you promised help by Connelly in the Sachs case shortly thereafter?

Answer: No, I was not.

46th Interrogatory: Did you leave for Washington within a few days after being retained in the Sachs case?

Answer: I don't know.

47th Interrogatory: Did Connelly introduce you to high officers in the Internal Revenue Service on that trip?

Answer: The only thing that he introduced me to is Schoeneman.

48th Interrogatory: In view of the evidence that you were in Washington on that occasion in connection with the Sachs case, is it now your position that you were there in connection with some business other than the Sachs case?

Answer: Yes, I was.

49th Interrogatory: When you were retained in the Sachs case, did you tell the co-counsel of your connection with high officials in Washington?

Answer: No.

50th Interrogatory: Documentary evidence in this case (Pl. Ex. 54 (f)) shows that on September 9, 1948 you called Mr. Oliphant saying "Matt thought it would be a good idea to see if there is anything new in regard to Shu-Stiles" and that Mr. Oliphant agreed to see and contact you later. Do you remember calling Mr. Oliphant on that occasion?

Answer: I suppose I did, but I'm not sure.

51st Interrogatory: Do you remember that you told him that?

Answer: I am—well, I'm not sure that I told him that, but it's probable that I did.

52nd Interrogatory: Do you remember that you talked with Connelly about the Shu-Stiles case shortly prior to that call?

Answer: I know I did not.

53rd Interrogatory: What were the issues involved in the Sachs-Shu-Stiles case when it was before the Internal Revenue Service?

Answer: Well, it was—I don't know what it was, but it was not health. That was about the Internal Revenue Department.

54th Interrogatory: The evidence shows that during the period the tax case was in the Internal Revenue Service you received numerous checks in large amounts from Shu

Stiles, Inc. What were these checks for and what was done with the proceeds?

Answer: Well, all of it was supposed to go to me, and it was supposed to go to me; and I never knew that Connelly or Caudle ever received a penny from these checks.

55th Interrogatory: Did you on January 25, 1949 call Mr. Oliphant on the telephone and make an appointment to see him that same day?

Answer: Yes—I don't know, but I suppose so.

56th Interrogatory: Do you remember the purpose of this visit and who was present?

Answer: Well, I don't know what was the purpose of the visit.

57th Interrogatory: Do you remember that on June 17, 1949 you wrote Mr. Oliphant about the Sachs case and expressed the hope that "a proper settlement may be effected" of the case? Plaintiff's Exhibit 5 DDD to be attached.

(Plaintiff's Exhibit 5 (DDD) was read by the Notary Public to the witness. Interrogatory No. 57 was repeated to the witness.)

Answer: Yes, I did—I assume I did.

58th Interrogatory: If you so remember, what did you mean by the phrase "a proper settlement may be effected"?

Answer: I meant a cash settlement.

59th Interrogatory: When and where and under what circumstances did you first meet Mr. Caudle, and what was his occupation then?

Answer: I met him in September or October, 1949, and that was—he was a tax consultant, a head of the Tax Department, of the Government service.

60th Interrogatory: When and where and under what circumstances did you first meet Mr. Connelly, and what was his occupation?

Answer: Secretary to Senator Truman.

61st Interrogatory: Do you remember that in August, 1949 a Mr. Skeer was taking care of your business during your absence in Coronado, California?

Answer: Yes, he was.

(Mrs. Kanter entered the room at this point.)

62nd Interrogatory: Do you remember that he called you long distance and told you the Sachs case was being transferred to the Department of Justice?

Answer: Yes, he called me.

63rd Interrogatory: Did you tell him that you were going to call Mr. Connelly about this?

Answer: Yes, I did.

64th Interrogatory: Did you in fact call Mr. Connelly about that?

Answer: Yes, I did.

65th Interrogatory: Did you call anyone else in Washington about the transfer of the Sachs case to the Department of Justice?

Answer: I don't know whether I did or didn't.

66th Interrogatory: State in substance if you can what you told the grand jury on November 15, 1955 was the purpose of the $10,000 check made out to you.

The Witness: Read me the date of that.

(Interrogatory No. 66 was repeated to the witness:)

Answer: I told them that—I presume that I told them that five thousand eight hundred dollars was going to me, and seven—no—four thousand two hundred dollars was going to Matt Connelly. But I don't know that I told them that, in the first place.

Mr. Cole: Excuse me, may I have that response as you've got it, please?

(Witness' response to Interrogatory No. 66 was read by the Notary as recorded.)

67th Interrogatory: Did you or did you not tell that grand jury that the $10,000 check to you was a retainer check?

Answer: Yes, I did, but I did not remember that.

68th Interrogatory: If your answer to the previous question is "No", state how you described this check to that grand jury.

Answer: Well, I said a certain amount was going to me and a certain amount was going to Matt Connelly, but he never knew about it.

69th Interrogatory: State whether you misinformed the grand jury concerning the payment to you of the $10,000 check, and, if so, what was it?

Answer: I don't remember.

70th Interrogatory: State the person or persons who gave you your instructions concerning the way the $10,000 was to be distributed, and in what manner such instructions were communicated to you.

Answer: Nobody at all.

71st Interrogatory: Was the $10,000 check deposited in your personal account or in a trustees account, and in what bank?

Answer: Well, I don't know precisely what bank, but I think it was the Columbia National Bank.

72nd Interrogatory: State whether your co-counsel in the defense of Irving Sachs were informed by you or anyone else to your knowledge of the receipt by you of the $10,000 check, and, if so, what were they informed was its purpose?

Answer: I don't know whether they knew or did not know.

73rd Interrogatory: State what your fee arrangement was with your other co-counsel.

Answer: I had the fee coming to me, and they had their fee according to their work.

74th Interrogatory: Was this agreement in writing?

Answer: I don't know.

75th Interrogatory: Was any part of the $10,000 eventually retained by you as attorneys fees, and if so, how much?

Answer: I don't know exactly, but thirty-five—thirty-six hundred—No, wait a minute—thirty-four hundred—

Mrs. Kanter: Sixty-four——

Mr. Imlay: Don't talk to him, Mrs. Kanter.

The Witness: Why shouldn't she talk to me?

Mrs. Kanter: You can put it in the record, can't you?

Mr. Shenker: I think he should answer, and if he doesn't know, even if it's a matter of adding, I don't think anyone should interfere. Just let him do the best he can, realizing his condition. Just let him do the best he can. If he can't figure it out, he can't figure it out.

Answer: (continuing) Sixty-five hundred and forty-four thousand dollars was retained by me, and thirty-six hundred was for the royalty. Thirty-six hundred and some-odd dollars.

76th Interrogatory: If you did retain part of the $10,000 for your own use, was this with the agreement and knowledge of your other co-counsel?

Answer: No.

77th Interrogatory: By what method and when did you so inform the other co-counsel that you were paying over to yourself such sum of money?

Answer: They weren't supposed to know.

78th Interrogatory: When you were before the grand jury on November 15, 1955, was the following question asked you and did you give the following answer:

"Q. Is it your statement that you regarded this money as some sort of an advance?

"A. It was an advance on my fee. It is what you call a retainer fee. It is for work to be done or maybe, as I said before, work I had already done."?

Answer: Yes, I did.

(At this point the witness requested a short recess. A recess of approximately five minutes was taken.)

79th Interrogatory: If you did not so testify, to what did you testify?

Answer: I don't know.

80th Interrogatory: State whether or not you explained to the grand jury that part of this $10,000 was intended or actually used to buy an oil royalty for Matthew Connelly.

Answer: I don't know if I did or I didn't.

81st Interrogatory: State whether or not your memory as to what the purpose of the $10,000 was, is as good now or better than it was on November 15, 1955.

Answer: Well, you'd better—I can't say that I'm better now than I was then, because I could read and write and have the faculty of my memory then, when I don't have it now.

82nd Interrogatory: Did you tell the grand jury that part of the $10,000 was to be kept in one of your accounts and held in escrow?

Answer: I don't know.

83rd Interrogatory: Your sworn statement given on behalf of Mr. Connelly on June 3, 1958, at page 20, indicates that the $10,000 was received by you from the Shu-Stiles Company "on account of Mr. Sachs". Is this statement correct?

Answer: I presume that it is.

84th Interrogatory: Is this statement the same that you told the grand jury?

Answer: I don't know if it did or it didn't.

85th Interrogatory: You have already testified concerning Exhibit 100-J. Is this one page of a journal kept by you in your handwriting and containing entries running from January 1948 to December 1950?

Answer: I believe it is.

Mr. Harris: I'd like the record to show that he wasn't shown 100-J at this time.

Mr. Shenker: That's right.

Mr Imlay: Exhibit 100-J, of course, was shown him by the——

Mr. Harris: Was shown him yesterday.

Mr. Imlay: It was shown him yesterday.

Oh, here it is.

(Photostatic copy of Exhibit 100-J handed to the witness.)

86th Interrogatory: I show you a copy of Exhibit 100-J. Can you read this exhibit previously shown you by the defense counsel?

Answer: I cannot read the exhibit at all.

87th Interrogatory: Do you distinctly remember making this entry?

Answer: Yes, I do, because I got the figures down here. But I don't know what the writing is.

88th Interrogatory: Do the pages of the journal of which this is a page reflect your various financial transactions with Shu-Stiles, Inc., and Irving Sachs including various reimbursements for out-of-pocket expenses during the period January, 1948, to December, 1950?

Answer: I don't know whether it does or does not.

89th Interrogatory: What was the purpose of entering the various entries relating to reimbursements of traveling and other expenses by Shu-Stiles, Inc., and "loans" in this journal?

Answer: I don't know what it was, whether it was expenses or what.

90th Interrogatory: You have stated that this book was kept for tax purposes.

The Witness: Yes.

90th Interrogatory (continuing): How would the recording of such items relate to tax information?

Answer: Well, I knew that I recorded it that way.

91st Interrogatory: Did you keep this book to show to tax authorities if your returns were challenged?

Answer: Yes.

92nd Interrogatory: It is your contention that you kept

erroneous information for October, 1949, in this journal for tax purposes?

Answer: No, I did not.

93rd Interrogatory: An entry in this journal dated September, 1949, on a page admitted into evidence as Exhibit 100 (G) reflects as an "advance or loan" from "Shu Stiles", an item of $2400. State how this fund of money was dispensed and for what purpose.

Answer: I don't know.

94th Interrogatory: Were your co-counsel in the Sachs case informed that this item of $2400 was turned over to you, if in fact it was?

Answer: No, they weren't advised.

95th Interrogatory: Did you declare this item or any part thereof on your income tax returns, and if so, when?

Answer: I don't know.

96th Interrogatory: One line of this Exhibit 100-J indicates a $2,500 "loan" from I. Sachs. Was this amount loaned to you, and if so, by whom and what did you do with this money?

Answer: I don't know what I did with it.

97th Interrogatory: Did you inform your co-counsel in the Sachs case that this amount was loaned to you?

Answer: No, I did not.

98th Interrogatory: In respect to the line "Pd out Oil Royalty M. C. 4,200", it has been conceded that "M. C." refers to Matthew Connelly, and that $3,600 for an oil royalty was taken from this account. Why did you indicate the sum of $4,200 here as the sum used for oil royalty?

Answer: I don't know why I did that.

99th Interrogatory: Is it a fact that the sum of $4,200 was the amount you predicted that an oil royalty for Connelly would cost prior to agreeing on its actual price with Chris Rhodes?

Answer: I don't know what I agreed with Chris Rhodes, but I certainly never agreed to pay more than that.

100th Interrogatory: Is it your position that you entered this figure of $4,200 here because you wanted a record for tax purposes?

Answer: No.

101st Interrogatory: If that was not your purpose, state why you recorded this amount of $4,200 here.

Answer: I don't know, except—I don't know.

102nd Interrogatory: When asked by Mr. Connelly's attorney in your previous sworn statement when this entry was made, you could not definitely say. Can you definitely state now when it was made, and if so, state when it was made.

Answer: No, I don't think I can. But I do remember—I don't know what I made the entry for.

103rd Interrogatory: Would an entry in a journal covering the period of a month normally be made at the beginning of the next month?

A. No.

104th Interrogatory: Exhibit 100-J indicates the date October, 1949. Would you normally have made this entry when all the business of the previous month was concluded, in this instance, about the first week in November, 1949?

Answer: No, I do not know.

105th Interrogatory: In respect to the sum of $5,800, the Exhibit 100-J indicates that it was to be held "in escrow" to be paid out depending on whether I. Sachs is dropped. What is your understanding of the meaning of the term "escrow?"

Answer: "Escrow" means the money would go to me.

106th Interrogatory: Was the $5,800 actually retained in your own bank account? If so, where and to whom was it "to be paid out", if it was already in your account?

Answer: I don't know.

107th Interrogatory: In a sworn statement you gave to the attorney for Mr. Connelly on June 3, 1958, you indicated that you discussed the subject of an oil investment

with Mr. Connelly and Tom Evans at the Muhlbach Hotel in Kansas City.

The Witness: Yes, that is correct.

107th Interrogatory (continuing): When was that discussion and what was said and agreed on, if anything, there?

Answer: Matt Connelly didn't have the money, so Mr. Evans said that he would loan him the money. And that was for seven hundred dollars.

108th Interrogatory: Did you have any other conversations with Mr. Connelly regarding the purchase of an oil royalty for him, and if so, where and when?

Answer: I don't know.

109th Interrogatory: In your sworn statement recently given to the attorneys for Mr. Connelly on June 3, 1958, you indicated that Tom Evans knew what this royalty actually cost. How and when did he learn of its actual cost, and state in what way you ascertained this fact?

Answer: I told it to him privately.

110th Interrogatory: Did you make a trip with Mr. Tom Evans during the latter part of 1949, and if so, by what method of transportation and where did you go?

Answer: I do not know.

111th Interrogatory: Did you discuss the purchase of an oil royalty for Connelly with Tom Evans on this trip?

Answer: No. I don't remember ever taking a trip with Tom Evans.

112th Interrogatory: Did you tell Tom Evans that you would like to do something for Matt Connelly because he has been so very nice to you?

Answer: No, that was very, very wrong.

113th Interrogatory: Mr. Evans has testified that you told him, "Why couldn't I buy him an oil royalty that would cost seven or eight hundred dollars that would produce for him thirty, forty, or fifty dollars a month?" Do you remember saying this, and if so, where and when?

Answer: I never said that.

114th Interrogatory: Did you tell Evans that you guaranteed that Connelly would not lose money or words to that effect?

Answer: Oh, I may have said that to him, but I don't remember where it was.

115th Interrogatory: Do you remember that Evans later talked with Connelly and offered to lend him the sum of $750, and then telephoned you to that effect?

Answer: No.

116th Interrogatory: Did Tom Evans lend Connelly $750?

Answer: Yes, he did.

117th Interrogatory: Did Connelly send you the sum of $750?

Answer: Yes, he did.

The Witness: I said seven hundred dollars, but it was seven hundred fifty dollars.

118th Interrogatory: If so, did he send this sum in the form of a cashier's check made out to you?

Answer: I don't remember who it was made out to, but I suppose that it was a cashier's check made out to me.

119th Interrogatory: Did you later send Mr. Evans a check for $750 to cover his loan to Connelly?

Answer: Yes, I did.

120th Interrogatory: When did you buy the oil royalty for Mr. Connelly?

Answer: In December of 1949, and then I sent it to him about January or February, 1950.

121st Interrogatory: How much did you pay for it?

Answer: Here is the amount I paid for it.

(Witness made calculation on sheet of paper and indicated last amount on sheet to the Notary Public.)

Mr. Cole: I'd like that paper made a part of the record.

Mr. Shenker: I think we can all agree that the last figure shows "3600," is that correct?

Mr. Cole: But keep that page and make that page a part of the record.

(Sheet of paper used by the witness in making calculation attached hereto as Appendix D.

U. S. A. counter-interrogatory 121.)

122nd Interrogatory: Do you remember that on October 26, 1949, Mr. Connelly called Mr. Caudle to say that you were in town, and to ask whether you could come over to the Department of Justice?

Answer: I don't know, but I presume that he said this.

123rd Interrogatory: Were you with Mr. Connelly when this call was made?

Answer: I don't know—or I don't remember.

124th Interrogatory: Did you personally see Mr. Connelly at the White House on this occasion?

Answer: I saw him on that occasion, that's all.

125th Interrogatory: Did you discuss the purchase of an oil royalty for Mr. Connelly with anyone on this trip to Washington?

The Witness: What was that trip?

Mr. Harris: I think you ought to go back to 122.

(Interrogatory No. 122 repeated to the witness. Interrogatory No. 125 repeated to the witness.)

The Witness: Wait a minute, state more specifically—I can't read it—or I can't visualize it.

(Interrogatories Nos. 122 and 125 repeated to the witness.)

Answer: I didn't talk to Mr. Connelly about an oil royalty.

126th Interrogatory: The evidence shows that you were in Washington for the meeting with Caudle arranged by Connelly two weeks after Sachs made out the check in your favor for $10,000 on October 12, 1949. Did you dis-

cuss the oil royalty purchase with Mr. Connelly on this occasion?

Answer: No, I didn't.

127th Interrogatory: The entry on the Exhibit 100-J has at the top the date line "Oct-49". Did you make this entry on the Exhibit 100-J after your conversation in Washington with Connelly, referred to in interrogatory No. 125?

Answer: Yes—No, I don't know when I made the date on this.

Mr. Shenker: Let the record show that when he said "this" he was referring to Exhibit 100-J, which was lying there and which he touched and referred to.

128th Interrogatory: Can you distinctly remember whether you did or not?

Answer: No, I can't.

129th Interrogatory: Did you see Mr. Caudle on October 26, 1949, on that trip to Washington?

Answer: I presume it was that date. But he sent me back home and told me to recuperate.

130th Interrogatory: Do you remember that you talked alone with Caudle prior to being joined by Turner Smith who was called into a conference at the Department of Justice?

Answer: No, I do not remember.

131st Interrogatory: Did you on that day first suggest that Sachs was in bad health?

Answer: He was in bad health prior to I knew him.

132nd Interrogatory: When did you first know that Sachs was in bad health?

Answer: From the minute that I saw him, we discussed it.

133rd Interrogatory: What was the nature of his illness?

Answer: I don't remember what the nature of his illness was, but——

134th Interrogatory: The evidence shows that Connelly was paid 25 checks on his oil royalty. Were these sent direct to your office, and if so, why?

Answer: Well, I sent them to my office, and I sent them to him direct.

135th Interrogatory: How did you handle these checks after receiving them?

Answer: I sent them to him.

136th Interrogatory: Whose idea was it that they be handled in this way?

Answer: My idea, my idea.

137th Interrogatory: Did you send them to Mr. Connelly's private residence in Washington, and if so, whose idea was it that this procedure be followed?

Answer: I presume that I did. It was my idea.

138th Interrogatory: Was this method of sending checks through you to Connelly devised so that the transactions would be more difficult to trace?

Answer: No.

139th Interrogatory: Did you ever discuss the Sachs tax case with Mr. Caudle in private at any time and if so, when?

Answer: Never before in private; always with someone else there.

140th Interrogatory: Did you confer with Mr. Caudle about the case in long distance telephone conversations?

Answer: Yes.

141st Interrogatory: Did you go to Mr. Caudle's home at any time while working on the Sachs tax case?

Answer: Yes, I did.

142nd Interrogatory: Did you confer with Caudle in Florida at any time, and if so, when?

Answer: I think it was in 1952, and he was telling me to get this thing out of his name.

143rd Interrogatory: Did you endorse Caudle's own name or any of his eight oil royalty checks, and if so, when?

(Discussion off the record.)

Mr. Shenker: Let the record show that the word "or" may be changed to "on."

(143rd Interrogatory: Did you endorse Caudle's own name on any of his eight oil royalty checks, and if so, when?)

Answer: I don't know, but I presume that I did.

144th Interrogatory: If you did not, state if you know who did.

Answer: Well, my secretary may have endorsed it.

145th Interrogatory: Did you retain any of the money from any such checks?

Answer: Yes, I did.

146th Interrogatory: If your answer is in the affirmative, state whether you declared such amounts as income on your tax returns, and if so, when.

Answer: I don't know.

147th Interrogatory: If all of the money from the Caudle oil checks were not paid to you, describe to whom it was paid.

Answer: Just to me.

148th Interrogatory: The evidence shows that one of Caudle's oil royalty checks was endorsed only by him (Pl. Ex. 89 (d)). State what was done with the proceeds of this check, if you know. Exhibit to be attached.

Answer: Well, he turned the money over to me.

149th Interrogatory: Were the proceeds of these checks placed in your own or a trustee's or attorney's account in the Columbia National Bank in Kansas City?

Answer: I don't know about that.

150th Interrogatory: The evidence shows that the first three of Caudle's oil royalty checks were endorsed first by him, and then by you. Then you bought a cashier's check in the amount of these three checks which you kept for a year, and which you then negotiated in Puerto Rico. Do you admit that this was the true facts?

Answer: Yes.

151st Interrogatory: If not, state what the true facts are as to the way you handled these three checks.

Answer: They—The previous answer answers it.

152nd Interrogatory: If you admit that you did this, state why you did it.

Answer: I don't know why I did it, but I had reason to do it, but I don't know why.

153rd Interrogatory: Did you ever have occasion, to discuss other oil investments with Mr. Caudle?

Answer: Yes, I did.

154th Interrogatory: Did you have any other transactions with him regarding oil investments?

Answer: Yes, I did.

155th Interrogatory: If so, state what they were.

Answer: Well, he never was interested in these oil royalties, but gave me the name of two oil men that I interviewed, but he was not—he had nothing to do with those royalties.

156th Interrogatory: Do you remember calling both Mr. Caudle and Connelly on March 7, 1950?

The Witness: What date is that?

(Interrogatory No. 156 repeated to the witness.)

Answer: I don't remember whether I did or didn't.

157th Interrogatory: Do you remember then having a conference with Caudle on March 10, 1950?

Answer: I don't—I don't presume so, but I guess I did.

158th Interrogatory: Do you remember that you made another call to Caudle from Kansas City on April 23, 1950 (Pl. Exs. 66, 73)? Exhibit to be attached.

(At this point the witness asked for a brief recess. A recess of approximately five minutes was taken.)

The Witness: I cannot go—Just for a little while. I cannot go on for a little while.

(A recess of approximately five minutes was taken.)

The Witness: I'm ready now.

Mr. Harris: (To the Notary Public) Re-read the question.

158th Interrogatory (repeated): Do you remember that you made another call to Caudle from Kansas City on April 23, 1950 (Pl. Exs. 66, 73)? Exhibit to be attached.

Answer: I don't know for sure, but I assume I did.

159th Interrogatory: Did you, on April 26, 1950, confer with a Dr. Tureen, and tell him what medical information you needed concerning Mr. Sachs?

Answer: No; he told me what I needed, that Dr. Tureen.

160th Interrogatory: If so, did you later that day go to a hotel with Mr. Shifrin and Mr. Sheffrey and prepare interrogatories in question and answer form and send them to Dr. Tureen for his signature?

Answer: After he told me what Sachs was suffering from, he—Mr. Sheffrey and I went to a hotel room and copied out the names of the disease and many other things.

161st Interrogatory: Did you then send these interrogatories directly to Caudle?

Answer: Yes, I did.

162nd Interrogatory: Did you make an arrangement with Caudle prior to preparing the interrogatories that they be sent to him?

Answer: I don't remember now what I did.

163rd Interrogatory: Do you remember a letter written by Caudle on May 3, 1950 saying that he had read the interrogatories and that they had personally impressed him very much?

Answer: Yes, I know that he did, but I don't remember the date.

164th Interrogatory: Do you remember that prior to the time you received Caudle's letter of May 3, 1950, you called him by telephone and asked that he read the interrogatories of Dr. Tureen in full?

Answer: Yes, I suppose I did.

165th Interrogatory: Could you have made such a request of Caudle in a call on April 23, 1950 before the interrogatories of Dr. Tureen were actually taken?

Answer: No, I don't think so.

166th Interrogatory: Plaintiff's Exhibit 76 (L) indicates that you wrote Chris Rhodes on July 13, 1950, in regards to the oil royalty stating you thought you would be willing to pay $3,300 but

> "I have to wait to get this information to the person interested, which should take a couple of days, then you will hear from me."

This letter adds, "However, I am pretty confident we will take it." Do you remember this letter? Exhibit to be attached.

Answer: Well, I don't admit that I sent the letter, but I was pretty close to that.

167th Interrogatory: Who was the other person you refer to?

Answer: I don't know.

168th Interrogatory: The evidence indicates that 3 days prior to this on July 10, 1950, Caudle called you and talked for nine minutes [Plaintiff's Exhibit 137 (a)]. If you remember this to be a fact, state whether you discussed the oil royalty that you were then negotiating for him, and what was the substance of the conversation.

Exhibit to be attached.

Answer: No, it wasn't the oil royalty, but I don't remember what matter it was.

169th Interrogatory: Mr. Caudle testified that you discussed investments with him in his office at the Department of Justice prior to July 15, 1950. The evidence shows that on July 15, 1950, you wrote to Rhodes,

> "I just received word to go ahead on the purchase of the oil royalty."

You also stated that you would send your check for $3,300 Monday, that "the royalty should be purchased in the name of T. L. Caudle, 2939 Newark, N. W., Washington, D. C." and that you were leaving Tuesday morning for Washington. [Plaintiff's Exhibit 76 (M)]. State whether you wrote this letter.

Exhibit to be attached.

Answer: I don't remember whether I did or whether I didn't.

170th Interrogatory: Was it the result of a conversation with Caudle in Washington prior to July 15, 1950?

Answer: I don't remember.

171st Interrogatory: Also there is in evidence one check dated July 15, 1950, made out to you by Shu-Stiles, Inc., in the amount of $3,600, negotiated on July 17, 1950 [Plaintiff's Exhibit 21 (S), 158], together with another for $742 from Shu-Stiles [Plaintiff's Exhibit 21 (R)]. State what you did with this money.

Exhibits to be attached.

Answer: I don't know what I did with the money. I presume I deposited it in the bank.

172nd Interrogatory: Did you make out a check to Chris Rhodes on July 17, 1950, in the amount of $3,300?

Answer: Yes, I did. I presume I did.

173rd Interrogatory: There is an entry in your journal admitted in evidence as Plaintiff's Exhibit 100(P) which carries a $3,600 item as "Reimbursement of Money Advanced Shu-Stiles." Does this relate to the purchase of Caudle's oil royalty, and if not, explain what it means.

Answer: It had nothing—It had nothing to do with Caudle's oil royalty at all. But I don't know what it means.

174th Interrogatory: Was $3,600 the original price offered for the oil royalty by Chris Rhodes on June 27, 1950?

The Witness: What was the amount, please?

(Interrogatory 174 was repeated to the witness.)

Answer: I don't know what it was.

175th Interrogatory: State whether on August 4, 1950, you wrote a letter to Mr. Caudle at his home enclosing a transfer order for the oil royalty for Mr. Caudle's signature.

Answer: I don't know, but it's a fact that I did enclose the oil royalty.

176th Interrogatory: Mr. Caudle testified that a little before August 5, 1950, you called him from Kansas City and told him you had bought two oil royalties, one for him for $750 and one for yourself for $750. Is this a true statement of what happened?

Answer: Yes, it is, but I don't know what date it was.

177th Interrogatory: Did you in September 1950 have a conversation with Mr. Caudle wherein he stated that he had not received a check on September 15, 1950 for his oil royalty?

Answer: No, I didn't.

178th Interrogatory: There is a letter admitted in evidence, dated September 18, 1950 in which you told Rhodes that although you had received the deed on the property you purchased in Caudle's name, you did not receive the September 15th check. In this letter you asked him to check with the Sinclair Oil and Gas Company, because, as you state in the letter, "Mr. Caudle has already asked me about it" (Plaintiff's Exhibit 76(s)). Do you remember writing this letter?

Exhibit to be attached.

Answer: Yes, I do—did something like that.

179th Interrogatory: Do you deny writing this letter?

Answer: No, I did not. But it was this letter, but Caudle had nothing to do with it.

180th Interrogatory: If you wrote the letter, did you tell Rhodes the truth when you said that Caudle had already asked about the September 15th oil royalty check?

Answer: No, it——

Well, what shall I answer, yes or no? I said Caudle had nothing to do with that royalty.

181st Interrogatory: Did you write another letter on October 12, 1950, telling Rhodes that you still had not received the September 15th check and did you make the following statement:

"I hate like the devil to bother you, but I am sort of in a spot."

(Plaintiff's Exhibit 76-U). Exhibit to be attached.

Answer: Yes, I suppose I wrote the letter, but now I don't remember it.

182nd Interrogatory: Do you remember receiving a letter from Caudle dated September 6, 1950, in which he said he had enjoyed seeing you the other day? (Pl. Ex. 144 to be attached).

Answer: I presume I did.

183rd Interrogatory: Do you remember seeing Mr Caudle just prior to September 6th, 1950?

Answer: I don't remember whether I did or whether I didn't.

184th Interrogatory: Did you at this time discuss with Mr. Caudle possible investments in other oil properties in which Mr. Bob Fletcher and Mr. Caudle had an interest?

Answer: No, I didn't.

185th Interrogatory: If so, state whether you had any further contact with Mr. Fletcher in any way, and if so explain what it was.

Answer: Either an oil royalty in Texas or Oklahoma. I don't know which. That was Mr. Fletcher.

186th Interrogatory: State whether you had information that Caudle had a commission arrangement with Fletcher on the sale of oil properties.

Answer: I do not know.

187th Interrogatory: Do you remember writing Caudle at his home on September 8, 1950, stating in part, "I will

have the letter from the doctor for you next week" and signed "Fondest regards,

Harry I. Schwimmer."

Plaintiff's Exhibit 107 to be attached.

Answer: I think I did, but I am not sure.

188th Interrogatory: If so, why did you send this to his private home and not the Department of Justice?

Answer: I can't say why I did.

189th Interrogatory: Do you remember a conversation with Mr. Sheffrey in which you told him of your desire to "give" some oil royalties to Caudle because of his attitude in the Sachs case?

Answer: No, I never did, and Mr. Sheffrey lied about that.

190th Interrogatory: State whether Sheffrey warned you not to do this because if Caudle accepted the oil royalty from you it would be disclosed.

Answer: He never did.

191st Interrogatory: State whether you told him in reply in substance that the royalties were in some other account or in another or a fictitious name.

Answer: I didn't say anything to Mr. Sheffrey.

192nd Interrogatory: State whether your practice of handling both the papers and the royalty checks in connection with both the Connelly and Caudle oil transactions, and having all papers addressed to them in care of your office, was intended to conceal these transactions.

Answer: No, it was not.

193rd Interrogatory: If not, why was this device used?

Answer: I don't know.

194th Interrogatory: Did you also act as Caudle's agent in handling his oil royalty checks?

Answer: No.

195th Interrogatory: On September 13, 1950, you wrote to Mr. Caudle and sent him a statement by Dr. Tureen wherein it was suggested that Sachs might attempt suicide.

Your letter [Plaintiff's Exhibit (D)] indicates the statement is transmitted "pursuant to our recent conference." To what conference are you referring?

Exhibit to be attached.

Answer: Well, I don't know, but it was in Washington.

196th Interrogatory: Who was present at that conference?

Answer: I don't know, but somebody was present, somebody else beside Mr. Caudle—and somebody else.

197th Interrogatory: Did Mr. Caudle suggest that you should raise the argument that Sachs might try suicide?

Answer: No, he didn't.

198th Interrogatory: Do you know who Dr. Bernard Cruvant is?

Answer: I don't know his name.

199th Interrogatory: Explain what his duties were and where he practiced in 1950 and 1951.

Answer: I don't know his name.

200th Interrogatory: Did you suggest the name of Dr. Cruvant to Mr. Caudle?

Answer: No.

201st Interrogatory: Did Dr. Cruvant have anything to do with the Sachs case?

Answer: I don't know whether he did or whether he didn't; but some place the name of Kerwent or Kerwin is possible to have existed.

202nd Interrogatory: I show you Plaintiff's Exhibit 114. Is this in your handwriting?

(Plaintiff's Exhibit 114 handed to the witness.)

Answer: I don't know. Read it and see.

Mr. Shenker: Let the reporter read it.

Mr. Cole: Excuse me. If I may say something—and this may be on the record—I don't think anybody should read it, because the question says "Is this in your handwriting?" Either he answers it or he does not.

Mr. Shenker: I'm sorry—

The Witness: I can't read it.

(The witness put on his eyeglasses.)

Mr. Imlay: Wait a second—he is putting on his glasses.

The Witness: I don't know what it says.

203rd Interrogatory: This paper, the evidence shows, was found in Mr. Caudle's desk in the Department of Justice. Do you know how it got there?

Mr. Imlay: May I suggest that the reporter read it to him now?

Mr. Cole: No.

Mr. Shenker: No.

Answer: No, I don't know.

Mr. Imlay: Wait a second, Mr. Reporter.

May the record show that there was a conversation about reading this exhibit—Mr. Harris and Mr. Cole.

Mr. Cole: And Mr. Shenker.

Mr. Imlay: What is the consensus here?

Mr. Cole: Are we on the record? Is all of this on the record?

My position with regard to this is very simple. Interrogatory No. 202 states as follows:

"I show you Plaintiff's Exhibit 114. Is this in your handwriting?"

The answer to that was simply, "I can't read it. I don't know what this says."

Now, I see nothing further to be done with regard to it.

Mr. Imlay: And what was your position, Mr. Harris?

Mr. Harris: I've got no particular position. I don't know what the exhibit is. I'm looking at it for the first time.

After having looked at it, I still don't know what it is. Well, it's all right.

The Witness: Read the next question.

204th Interrogatory: Did you ever meet Dr. Cruvant and if so, where, and for what purpose?

Answer: I don't remember ever seeing him.

205th Interrogatory: State whether Dr. Cruvant is related to Mr. Sachs.

Answer: I don't know.

206th Interrogatory: When the Sachs case was returned to the Internal Revenue Service, did you receive a check of $10,000 as an attorneys fee from Shu-Stiles, Inc.?

Answer: I don't know, but I presume I did.

207th Interrogatory: Did you inform your co-counsel that you were given this sum?

Answer: I don't know whether I did or whether I didn't.

(Whereupon at 3:40 P. M. the propounding of the interrogatories was concluded.)

Harry I. Schwimmer.

Subscribed and sworn to before me this 21st day of October, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase
Notary Public for the State of New York
Qualified in New York County
No. 31-2239250
Commission Expires March 30, 1959

Notarial Certificate.

I, Thomas F. Lambiase, a Notary Public of the State of New York, do hereby certify that the foregoing interrogatories and counter-interrogatories were propounded by me to Harry I. Schwimmer, at his home, No. 4 Peter Cooper Road, Borough of Manhattan, City, County and State of New York, between the hours of 2:15 P. M. and 3:55 P. M. on Monday, September 29, 1958, and the hours of 2:05 P. M. and 3:40 P. M. on Tuesday, September 30, 1958.

I do further certify that counsel for the several parties were present as indicated on the title page of this deposition, and that Mrs. Jacquelyn Kanter and Dr. Walter Palmer were present as indicated thereon.

I do further certify that the said witness was by me duly sworn before the commencement of his testimony; that the testimony of the witness was taken stenographically by myself and then transcribed under my supervision; and that the within interrogatories and counter-interrogatories and the answers of the witness thereto are a true record of the testimony given by the aforesaid witness.

I do further certify that after the above-mentioned testimony was transcribed I went in person to the witness' home on October 21, 1958, where I read the complete record of the witness' testimony aloud to him (he being unable to read it himself); and that Mrs. Jacquelyn Kanter, the witness' daughter, was present during the reading of counter-interrogatories Nos. 43 to 103 and 132 to 207, and while the witness signed the transcript of his testimony.

I do further certify that I am not connected by blood or by marriage with any of the parties to this cause, nor am I interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

In witness whereof I have hereunto set my hand and seal of office in the County and State of New York this 22nd day of October, 1958.

Thomas F. Lambiase.

Thomas F. Lambiase,
Notary Public for the
State of New York
Qualified in New York County
No. 31-2239250
(Seal) Commission expires March 30, 1959.

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Appendix B
(Interrogatory 35, Matthew J. Connelly.)

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Appendix D
(U.S.A. counter-interrogatory 121)

United States District Court,
Eastern District of Missouri,
Eastern Division.

No. 28,439.

United States of America,
Plaintiff,

vs.

Matthew J. Connelly and
T. Lamar Caudle,
Defendants.

ORDER DENYING DEFENDANTS' MOTIONS FOR A NEW TRIAL UPON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

This cause comes before the Court on the respective motions of the defendants for a new trial upon the ground of newly discovered evidence.

Mr. Jacob M. Lashly, Mr. John H. Lashly and Mr. Paul B. Rava (of Messrs. Lashly, Lashly and Miller), St. Louis, Missouri, and Mr. Alan Y. Cole, Washington, D. C., appeared in behalf of defendant Matthew J. Connelly;

Mr. C. Arthur Anderson, St. Louis, Missouri, Mr. Walter M. Haynes, Winchester, Tennessee, Mr. John J. Hooker and Mr. John J. Hooker, Jr., Nashville, Tennessee, and Mr. T. Lamar Caudle, Jr., Hilton Head Island, South Carolina, appeared in behalf of defendant T. Lamar Caudle;

Mr. Harry Richards, United States Attorney, St. Louis, Missouri, and Mr. Oliver O. Dibble and Mr. Carl H. Imlay, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the United States of America.

Since the imposition of the sentences on the 5th day of March, 1957, this matter has been before the United States Court of Appeals of the Eighth Circuit where the judgments on the sentences imposed were affirmed, 249 F. 2d 576. Later, application was made to the Supreme Court for a writ of certiorari which was denied, 356 U. S. 921. Application then was made to the Supreme Court for a rehearing on this denial of a writ of certiorari, which likewise was denied, 356 U. S. 964. The mandate of the Court of Appeals came down on May 22, 1958. On June 12, 1958, this Court filed its order denying the petition of defendant Caudle for probation under Section 3651, 18 United States Code, and the application of Matthew J. Connelly for probation thereunder or in the alternative for a reduction of sentence. Thereafter, defendants filed their motions for a new trial on the ground of newly discovered evidence in the alleged available testimony of Harry I. Schwimmer. On June 19, 1958, the Honorable Archibald K. Gardner, Chief Judge, United States Court of Appeals, Eighth Circuit, ordered that the commitment of defendants be stayed until such time as the District Court had heard and ruled upon the motions of the defendants for a new trial. Shortly thereafter, the defendants filed their motion to perpetuate the testimony of Harry I. Schwimmer on written interrogatories and cross-interrogatories on the ground that he was ill and infirm, and hence unable to give oral testimony either in court or by way of deposition. They alleged that his testimony was material and that it was necessary to take his deposition in order to perpetuate his testimony and prevent a failure of justice. Subsequently, after a hearing, this Court ordered that the deposition of the said Schwimmer be taken as requested. The defendants submitted interrogatories and the Government submitted cross-interrogatories, which interrogatories have been answered by the witness and are now on file herein. Defendants' motions for a new trial are based upon the testimony obtained in said deposition. In addi-

tion, certain oral testimony as to the mental competency of Schwimmer was taken before this Court on December 15, 1958, and the defendants also submitted in support of Schwimmer's mental competency the affidavits of Dr. Irving S. Wright, dated June 5 and June 20, 1958, Dr. Walter Palmer, dated December 9, 1958, Dr. Nathan S. Kline, dated December 7, 1958, George Nemeth, a therapist, dated August 13, 1958, and Francis W. Adams, a lawyer, dated August 1, 1958. In connection with Schwimmer's mental competency, the Government filed the report of one Dr. John E. Scarff, a neurologist, and the affidavit of an Internal Revenue agent, one E. Russell Kennedy, Jr. In addition, as bearing upon the merits of defendants' motions, the Government submitted the evidence of the said Schwimmer which was taken before the Grand Jury in the Eastern District of Missouri in November, 1955.

The factual background of this proceeding has been set forth fully in this Court's order of February 8, 1957, denying defendants' joint motion for an acquittal or in the alternative for a new trial, and in the decision of the Court of Appeals.

It is defendants' position that since Schwimmer, named as a defendant with them in the indictment, had a heart attack during the trial on May 23, 1956, which required a continuance of the trial proceedings until May 28, 1956, on which day the late Judge Hulen granted a mistrial as to him, he continued to be ill during the summer and fall of 1956 and suffered a very severe stroke on October 17, 1956, with a complete loss of the power of speech and a "flaccid paralysis of the right arm and leg." Furthermore, in support of the motions it is represented that Schwimmer's improvement did not become appreciable until the spring and early summer of 1958.

The Government does not attempt to challenge the showing as to Schwimmer's mental and physical condition from

the time of the trial to the time that the deposition was taken, but it urges that Schwimmer's present mental condition is such that any testimony given in answer to the interrogatories would be inadmissible on a new trial because of the apparent lack of memory of the witness and the confused and befuddled nature of his testimony. In addition, the Government contends that a new trial should not be granted because Schwimmer's testimony does not relate to matters discovered since the trial; that there is a lack of due diligence on the part of the defendants; that the testimony is merely cumulative and is not material to the issues involved; and lastly, that the proffered testimony is not of such a nature that on a new trial the defendants, or either of them, probably would obtain an acquittal.

A consideration of the record would seem to justify a finding that the evidence of Schwimmer is newly discovered in the sense that, since the mistrial was granted as to him, the defendants were not able to avail themselves of any testimony which he might be willing to offer, in their behalf. Admittedly, the evidence of Schwimmer was not newly discovered since the trial in that Schwimmer was a party to the trial proceedings from May 8, 1956, until May 28, 1956, when a mistrial was granted as to him by reason of his illness. However, there was no opportunity for these remaining defendants to avail themselves of Schwimmer's testimony by reason of his illness, and it reasonably appears that, on account of a stroke in October, 1956, his mental and physical condition did not permit the taking of any statement or deposition from him until the spring or early summer of 1958. On this showing, therefore, the Court cannot say that the defendants have not acted with due deligence.

It is true that there was a hearing as to the admissibility of the Plaintiff's Exhibit 100-J before a mistrial was

granted Schwimmer. But the question before the Court at that time primarily involved Schwimmer's objection to that exhibit upon constitutional grounds, although defendants Connelly and Caudle had lodged a general objection to the exhibit when it was first offered. However, Schwimmer never was available to the defendants as a witness as to this exhibit before he was excused from the trial. Consequently, it seems that the Court must hold that the testimony given by Schwimmer in his deposition is not only newly discovered, but is relevant, and that it is not entirely cumulative, although in many respects it only tends to corroborate the evidence that the defendants had offered heretofore in their behalf at the trial.

It is evident from the showing herein that we are dealing with a witness who has decided infirmities in his memory. The deposition is replete with examples of his blocked off memory and lapses in his continuity of thought. Undoubtedly there may be a basis for the conclusion of Dr. Scarff when he states,

> "In summary, it is this examiner's opinion that Mr. Harry I. Schwimmer does not have either the physical or mental capacity to answer, in either oral or written form, any questions pertaining to matters which took place prior to his cerebrovascular accident which occurred on October 17, 1956."

On the other hand, there is the affidavit of Schwimmer's attending physican who was present when the deposition was taken, and he states,

> "On the basis of my observations during the course of the propounding of the interrogatories it is my opinion that Mr. Schwimmer had the capacity to understand the significance and meaning of the questions propounded to him and the ability to answer them. Mr. Schwimmer's difficulty was principally in

communicating his responses, but his answers generally seemed to be responsive to the questions posed."

My considered view is, however, that, in the event a new trial were granted, Schwimmer's deposition should be received and considered by a jury. But, although it is my opinion that he is a competent witness and that the weight and credibility of his testimony is for the jury, the frequent incoherent and vague answers in his deposition are highly important and relevant in determining whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted. An affirmative answer to this question is one of the necessary criteria which must be established before a new trial can be granted on the ground of newly discovered evidence.

Schwimmer is still under indictment in this proceeding. He also is under indictment for the alleged perjurious testimony he gave before the Grand Jury in November, 1955. It seems evident that, by his own admissions in the present deposition, he gave false testimony before the Grand Jury which was investigating this case. Moreover, there can be no possible question in light of the evidence at the trial that Schwimmer and Sachs conspired corruptly to influence high officials in the Government of the United States in the prosecution of the tax case against Sachs. The obtaining of oil royalties for Connelly and Caudle, which of course is admitted, was motivated by no other purpose than to obtain the assistance of their good offices in order to aid Schwimmer and Sachs in the achievement of their conspiracy, to wit, the declination of the Department of Justice to prosecute Sachs criminally.

Defendants now contend with great earnestness that, in the light of Schwimmer's testimony, Plaintiff's Exhibit 100-J could not be received in evidence against them.

However, that contention is without any sound basis for its support. When Schwimmer gave his testimony before the Grand Jury in November, 1955, he stated that the $10,000 which he received from Sachs in October, 1949, was paid to him as a retainer fee; that he had decided to ease up his labors as a lawyer by reason of his health and had determined to take fewer clients, but to charge them a higher fee; that it was in pursuance of that decision that he called upon Shu-Stiles to pay him $10,000 as a retainer fee in the Sachs tax case. Moreover, he told the Grand Jury that he paid no part of the $10,000 directly or indirectly for the benefit of Connelly and Caudle, and that he entered the payment of that sum in his journal book as attorney's fees. Obviously, that testimony was false and must be recognized as such in view of the exhibit itself and in light of Schwimmer's answer to certain questions in the interrogatories in his present deposition. Schwimmer states in his deposition that the journal was maintained for income tax procedure. But again it must be observed that his testimony in that regard is so patently contradicted by his other answers to the interrogatories that no credence can be placed thereon. He was unable to explain why he had entered the $2,500 loan in an alleged tax record and was not able to state whether he had ever paid any income tax on the $10,000 payment. He admits that the Connelly royalty was paid out from the $10,000 fund which he received from Sachs. The fact that Exhibit 100-J indicates that the Connelly royalty cost some $4,200 instead of $3,600 is of no particular significance. And, moreover, although the oil royalty for Connelly was not purchased until December, 1949, and the entry in the record was noted as of October, 1949, such variance is of no particular consequence in that the conspiracy had not ended on either date. The record impels one to find that the $10,000 paid to Schwimmer by Sachs was a slush fund for the purpose of aiding Schwimmer in his machinations

to free Sachs from criminal prosecution. Although the Sachs case was not dropped contrary to the designed scheme and plan of the conspirators, the entire $10,000 went to Connelly and Schwimmer.

In their motion for a new trial, defendants labor the apparent difficulties which confronted the late Judge Hulen when he first considered the admissibility of Exhibit 100-J. But any question or uncertainty in that regard now has been set at rest by the decision of the Court of Appeals. And it is clear that Schwimmer's deposition testimony has not weakened the basis for the admissibility of that document as relevant and competent evidence as to each of these moving defendants. If there ever was any real basis for doubt as to the admissibility of Exhibit 100-J, it seems indubitably clear now that the entries thereon were acts of a co-conspirator during the existence of the conspiracy and in the furtherance thereof. As this Court stated in its order of February 8, 1957,

> "Government Exhibit 100-J did not represent a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy."

The fact that Schwimmer now states that the remaining $6,400 after the purchase of the Connelly royalty went to him rather than to either of these defendants is of no controlling significance. The important fact is that Connelly received a $3,600 royalty out of a fund that was paid by

a taxpayer who was attempting through his attorney and co-conspirator, by corrupt means, to pollute the administration of justice.

Another evidentiary item which the defendant Connelly emphasizes as having been explained or clarified by Schwimmer's testimony is the letter he wrote to Connelly on January 5, 1948. It is significant, of course, that this letter was written about a week after Schwimmer had been retained in the tax case. It reads (Plaintiff's Exhibit 102):

"Dear Matt:

Tom informed me of your kindness in offering to help me, which I sincerely appreciate.

It was my original plan to leave for Washington some time this week. However, unfortunately my wife's father passed away unexpectedly, and, of course, it will be necessary for me to stay here for a little while longer.

I hope now to leave Kansas City about the 17th of this month, and if I may, I will call or wire you as to the date when I will be in Washington.

With fondest regards to you all, I am

Sincerely,

Harry I. Schwimmer"

After Schwimmer's return from Washington where he had contacted Connelly, who had arranged an appointment for him with the Commissioner of Internal Revenue, Schwimmer wrote Connelly as follows under date of January 28, 1948.

"I want to thank you, Matt, for the privilege of being with you and the courtesies extended. If there

is ever at any time anything that I can do for you, I am your willing and obedient subject."

In his deposition Schwimmer testified that the letter of January 5, 1948, referred to the so-called "helium" matter in which he was interested, and not to the tax case. Connelly gave similar testimony at the trial. Likewise, Tom Evans, who is the "Tom" referred to in the January 5th letter, testified at the trial that Connelly's offer of assistance had reference to the helium matter and not to the Sachs case because he, Evans, knew nothing about the tax controversy. Schwimmer's deposition testimony in this regard merely assumes to corroborate testimony which was given at the trial by the witness Evans and defendant Connelly. At best, the alleged corroboration is of questionable probative value. When Schwimmer was asked in one of the cross-interrogatories why he was going to Washington as he related in his letter of January 5, 1948, to Connelly, he answered, "I don't know." Then he was asked; "Did you come to Washington on or about January 17, 1948?" His answer was "I don't know." And when asked "What did you do in Washington on that occasion?" he answered "I don't know. I simply don't know what I did or what I didn't do." Although Schwimmer at one time had a so-called helium matter as to which he may have made trips to Washington, the entire showing strongly negates the truthfulness of his explanation of the January 5, 1948, letter to Connelly. Certainly, the $3,600 made available to Connelly from the $10,000 slush fund was not an honorarium to him for services in any helium matter.

In considering these motions, the Court must begin with the premise that there was sufficient evidence before the jury to sustain the guilt of these defendants beyond a reasonable doubt of the charge contained in the indictment. The Court must conclude also that on the trial record Ex-

hibit 100-J was an evidentiary document competent as to each of these defendants in that there was sufficient evidence without the consideration of Exhibit 100-J to find that these defendants were parties to the conspiracy charged and that this document was made by a fellow conspirator during its existence and in furtherance thereof. Moreover, as the Court of Appeals held, there was "independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to the prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit." The variance between the date of the entry as to the Connelly royalty purchase and the actual date of the purchase was made to appear at the trial, and the Court of Appeals held that this fact did not vitiate the competency or verity of this exhibit. It is true that Schwimmer does say in his deposition that it was his intention that the $6,400 remaining in the alleged escrow fund after the $3,600 was paid for the Connelly royalty was to go to him when and if the Sachs case was dropped, and not to Connelly or Caudle. But that evidence does not impair the admissibility of the document. Moreover, it does not affect the persuasive weight which must be attached to the language of this exhibit and the undisputed fact that Connelly did receive a $3,600 oil royalty from the fund.

At the trial, Tom Evans testified that Schwimmer informed him that he, Schwimmer, would like to do something for Connelly in that the latter "had been so very nice to me." In his deposition, Schwimmer unequivocally denies that he made any such statement to Evans. Moreover, Evans also testified at the trial that Schwimmer told him "why can't I buy him an oil royalty that would produce for him thirty, forty, or fifty dollars a month?" But in his deposition, Schwimmer also denies that he made that statement to Evans. Consequently, that portion of

Schwimmer's testimony only assumes to impeach the testimony of Connelly's close friends. Schwimmer does admit, however, that Evans loaned Connelly the $750 to buy the royalty which cost $3,000; and it is not denied in the deposition that the transaction was handled in a most circuitous manner with Evans sending a check to Connelly for $750, whereupon Connelly sent his check to Schwimmer for that amount in order to purchase the oil royalty and that later Schwimmer repaid Evans the $750 loan which had been made to Connelly. All of the communications were directed to Connelly's home address rather than to his office, and Schwimmer was unable to give any explanation as to why these transactions were handled in this manner.

The close, intimate relationship which existed between Caudle and Schwimmer during the existence of the Sachs case is evident by the correspondence that took place between them, and this friendly relationship continued up to the time of the Grand Jury investigation in 1951 regardless of the testimony of Caudle that Schwimmer had had the effrontery in August, 1950, to buy an oil royalty for him and place it in his name without his knowledge, all of which resulted in his alleged blistering attack on Schwimmer when he learned of the oil royalty transaction. Schwimmer's deposition testimony assumes, in part, to corroborate Caudle's testimony in this regard. However, in other respects his testimony utterly fails to explain the letters that Schwimmer wrote during the time that he was negotiating for and after he had purchased an oil royalty for Caudle. It must be apparent that the jury did not accept the explanation given by Caudle for this oil royalty transaction in light of all the evidence that it heard on this subject. It is admitted that Caudle signed the transfer order after he knew that the oil royalty had been placed in his name, and that he had endorsed at least three of the royalty checks which later were sent back to Schwimmer, who cashed them and put the funds in a money order which

he kept and did not cash until on or about January 31, 1952, in Puerto Rico. Moreover, it is not denied that Caudle did not divest himself of the oil royalty interest until April, 1951, which was after the investigation of the Grand Jury of the Sachs case, and at which time he wrote a note to Schwimmer stating that the transfer had been made "to correct the error that was made in this matter." This delay, allegedly due to Schwimmer's illness, is not borne out by the record. Schwimmer was able to handle business transactions long after Caudle was informed of the oil royalty purchase.

According to Attorney Sheffrey, who was co-counsel with Schwimmer in the Sachs case and who testified at the trial, Schwimmer told him that he desired to give Caudle some oil royalties because of Caudle's attitude in the Sachs case, and when Sheffrey warned him that an honest man did not do such things and that the transaction would eventually be disclosed, Schwimmer said that the royalties were or could be placed in a fictitious name. Schwimmer denies this conversation in his deposition and asserts that Sheffrey lied. But notwithstanding all of the protestations of Schwimmer to the effect that Caudle knew nothing about the oil royalty purchase and that he protested against it on or about August 4 or 5, 1950, he could give no satisfactory explanation in his testimony as to why on September 18, 1950, he wrote to Mr. Rhodes, through whom the oil royalty had been obtained, that Caudle had asked about the delay in the receipt of the royalty checks. And when asked a direct question as to whether or not he told the truth in this letter about Caudle's asking about the delay in the receipt of the oil royalty checks, his answer was, "No, it—well, how shall I answer, yes or no? I said Caudle had nothing to do with that royalty." And regarding plaintiff's Exhibit 76-L, which was a letter written by Schwimmer to Chris Rhodes in July, 1950, in which he indicated that he would be willing to pay $3,300 for an oil

royalty, and in which letter he stated, "I have to wait to get this information to the other person interested, which should take a couple days, then you will hear from me. However, I am pretty confident he will take it." Schwimmer in his deposition on being asked if he wrote the letter replied, "Well, I don't admit that I sent the letter, but I was pretty close to that." And when asked "Who was the other person you referred to" in the letter, he answered, "I don't know."

This case has been pending in the courts since 1956. The events of the controversy date back to November 1, 1945. Almost three years have elapsed since these defendants were tried and convicted. This Court is charged now with the duty of determining whether, in light of the present trial record, with the additional deposition testimony of co-conspirator Schwimmer, the greater portion of which is merely corroborative or impeaching, a jury probably would acquit these moving defendants, or either of them. There is no showing that Schwimmer's mental condition will improve; in fact, the showing presented to the Court in support of defendants' petition to perpetuate his testimony, indicated that he might die any day and the utmost dispatch of the deposition proceedings was highly necessary. Consequently, the Court must assume that there is no likelihood that Schwimmer's mental condition will be better. It probably will worsen. Moreover, there is no showing that, if a new trial were granted to these defendants, Schwimmer in his physical and mental condition would be able to face the ordeal of a criminal court proceeding against him as a co-defendant. To predict what a jury would do in appraising Schwimmer's testimony is of course something the Court cannot determine with any mathematical certainty. Whether, if sitting as a trier of the facts, I would probably acquit or convict the defendants in view of the additional proffered evidence by way of Schwimmer's deposition, is not determinative of the ques-

tion. But after a careful and painstaking consideration of the trial record and the bases now offered for a new trial, it is my considered opinion that it is not probable that the proffered testimony would result in an acquittal for these defendants in the hands of another jury. Although there is corroboration in Schwimmer's deposition for some of the testimony offered by Connelly and Caudle in their defense, the evidentiary picture as to them remains substantially the same when one considers the weight which would in all probability be given by a jury to the corroborating evidence.

The Court has not attempted to review herein all of Schwimmer's testimony, but it seems evident that, notwithstanding his general denial of any intentional wrongdoing on his part or on the part of Connelly and Caudle as charged in the indictment, his conduct as disclosed by the record speaks far more persuasively in that regard. From the outset it is apparent that, in the Sachs case, he was, in common parlance, the "fixer". His approach to the Sachs case was to ingratiate himself with high government officials by any means which would bring about a favorable result for his client. He was not a tax lawyer and knew that he had no defense in the Sachs tax fraud, although for a time he did urge a wholly unsupported contention that there had been a voluntary disclosure. He was the arch conspirator in the scheme and plan condemned by the jury in its verdict against these defendants. He is an admitted perjurer. His motives from the beginning were venal and corrupt. No other explanation can be made for his purchase of the oil royalties for the two top government officials with whom he was dealing. It is simply incredible that the offering of the fragmentary deposition testimony of this discredited witness in support of the defendants' alleged innocence could possibly have the weight and effect of producing an acquittal for these defendants, or either of them. In fact, they would have a far better

opportunity to obtain a favorable verdict from a jury without attempting to utilize as a crutch the aid of one whose alignment with them could have no other effect than to poison the minds of a jury against them. I have a strong conviction that the motions for a new trial on the ground of the newly discovered evidence of Schwimmer is merely a vehicle utilized by the defendants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal. It seems inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury.

The Court concludes, therefore, after due consideration, that the defendants' motions, and each of them, for a new trial upon the ground of newly discovered evidence should be, and hereby are, in all things denied. It is so ordered. An exception is allowed.

Dated this 4th day of March, 1959.

By the Court:

Gunnar H. Nordbye,
United States District Judge.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,213

Matthew J. Connelly and T. Lamar Caudle, Appellants,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 9, 1959.]

John H. Lashly and Alan Y. Cole (Jacob M. Lashly, Paul B. Rava, and Lashly, Lashly & Miller were with them on the brief), for Appellant Matthew J. Connelly.

T. L. Caudle, Jr. (Walter M. Haynes, C. Arthur Anderson and John J. Hooker were with him on the brief), for Appellant, T. Lamar Caudle.

Oliver Dibble, Attorney, Department of Justice (Malcolm R. Wilkey, Assistant Attorney General, and Donald C. Bush, Attorney, Department of Justice), for Appellee.

Before GARDNER, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Circuit Judge.

Appellants, with one Harry I. Schwimmer, were indicted for conspiracy to defraud the United States of the proper administration of Internal Revenue Laws and regulations and of the proper and faithful service of appellants, in violation of Section 371, Title 18, United States Code. We shall refer to appellants as defendants.

In the course of the trial Harry I. Schwimmer, who had been indicted with defendants, suffered a heart attack, whereupon a mistrial was granted as to him and the cause proceeded against the other defendants. The jury returned a verdict of guilty, but the trial judge departed this life before the entry of judgments. In due course, the Honorable Gunnar H. Nordbye, United States District Judge for the District of Minnesota, was designated as successor judge. Motions for judgments notwithstanding the verdict were presented to and denied by Judge Nordbye and judgments and sentences were thereupon entered. From the judgments and sentences thus entered defendants appealed to this court and the judgments of conviction were affirmed. 249 F.2d 576. Defendants then petitioned the Supreme Court for certiorari, which was denied. 356 U.S. 921. They then applied for rehearing of their petition, which was likewise denied. 356 U.S. 964. Defendants then applied for probation under Section 3651, Title 18, United States Code, which applications were denied. Each of the defendants then moved for a new trial on the ground of newly discovered evidence in the alleged available testimony of Harry I. Schwimmer, their co-defendant, as to whom a mistrial had been granted. These motions were denied on the ground, among others, that the evidence would not probably result in an acquittal if a new trial were granted. This appeal followed.

By way of preface, it may be stated that motions for new trial on the ground of newly discovered evidence are looked upon with disfavor and it is equally well settled that

such motions are addressed to the judicial discretion of the trial court and its decision will not be reversed on appeal except for a clear abuse of that discretion. **United States v. Johnson**, 327 U.S. 106; **Long v. United States**, 10 Cir., 139 F.2d 652; **Casey v. United States**, 9 Cir., 20 F.2d 752; **United States v. Hiss**, D.C. N.Y., 107 F.Supp. 128, aff'd. 201 F.2d 372; 23 Corpus Juris Secundum, Section 1453, p. 1224. In **Long v. United States**, supra, the Court of Appeals for the Tenth Circuit, in affirming an order denying a motion for new trial on the ground of newly discovered evidence, states the applicable rule of procedure as follows:

> "It is well settled that the matter of granting a new trial on after-discovered evidence rests in the sound judicial discretion of the trial court, and an order refusing a new trial on that ground will not be disturbed on appeal, in the absence of a plain abuse of discretion. **Wulfsohn v. Russo-Asiatic Bank**, 9 Cir., 11 F.2d 715; **Streckfus Steamers, Inc. v. Shuttleworth**, 4 Cir., 86 F.2d 327; **Morton Butler Timber Co. v. United States**, 6 Cir., 91 F.2d 884; **Weiss v. United States**, 5 Cir., 122 F.2d 675. And it is equally well settled that an application for new trial based upon that ground is not regarded with favor and will be granted with great caution. **Bonness v. United States**, 9 Cir., 2 F.2d 754; **Weiss v. United States**, supra; * * * "

The prevailing rule is thus stated in 23 Corpus Juris Secundum, Section 1453, supra:

> "The granting or the refusal of the motion rests very largely in the sound discretion of the trial court, the prime consideration being whether or not substantial justice has been done, and, in the absence of an abuse of such discretion, its ruling will not be interfered with by appellate tribunals. The courts, however, have always listened distrustfully to the claim of

newly discovered evidence, and as a ground for a new trial it is not favored."

It is urged in the briefs of defendants that the question of the credibility of witnesses and the weight to be given to their testimony is exclusively a function of the jury and cases are cited wherein the court in its instructions to the jury invaded the province of the jury as to this function. This rule, however, is applicable only where the issue is tried to a jury. In issues tried to the court it is the function of the court to determine the issues of fact and the credibility of testimony. A motion for new trial on the ground of newly discovered evidence is heard by the trial judge and it is his function to determine the credibility of all evidence that may be produced. 23 Corpus Juris Secundum, Section 1461, p. 1253; **United States v. Peller**, D.C. N.Y., 151 F.Supp. 242; **Johnson v. United States**, 8 Cir., 32 F.2d 127. The rule is succinctly stated in 23 Corpus Juris Secundum, Section 1461, supra, thus:

> "The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, such testimony would not be worthy of belief by the jury, the motion should be denied."

It is further argued that the court did not get the "feel of the case" because the witness, Schwimmer, did not appear on the witness stand and his demeanor could not have been observed by the court. In this case the testimony of the witness was secured by the answers to direct and cross interrogatories. The short answer to this argument would seem to be that the procedure in this case was not exceptional as the general practice is to support motions for a new trial on the ground of newly discovered evidence by affidavit. The court had before it and was familiar with every syllable of the questions and answers of this witness,

and the court also had before it affidavits as to the witness's mental and physical condition, and the court had had unusual occasion and opportunity to be familiar with all the testimony that had been presented in the trial of this case. This court in **Johnson v. United States**, supra, announced a formula for testing the sufficiency of evidence warranting the granting of a new trial on the ground of newly discovered evidence. This may be summarized as follows: (a) the evidence must be in fact newly discovered, i. e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

There was evidence which would have warranted the court in finding the witness incompetent to testify because of his physical and mental condition. The court, however, resolved that conflict in favor of defendants but held that the evidence was to a considerable extent simply corroborative of the testimony given at the trial or was in contradiction to certain testimony given at the trial, that the witness by his own testimony had committed perjury in his testimony before the Grand Jury, that he was under indictment for perjury and in effect that his testimony was not worthy of belief. The findings of the court on this hearing should not be disturbed unless clearly erroneous and we think they are sustained by substantial evidence. In **United States v. Johnson**, supra, it is said:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

In deciding this motion the court, as was its function, determined that the evidence offered, so far as material, was incredible. After reviewing the evidence presented, the court's conclusions are reflected in the closing paragraphs of its decision, which reads as follows:

"The Court has not attempted to review herein all of Schwimmer's testimony, but it seems evident that, notwithstanding his general denial of any intentional wrongdoing on his part or on the part of Connelly and Caudle as charged in the indictment, his conduct as disclosed by the record speaks far more persuasively in that regard. From the outset it is apparent that, in the Sachs case, he was, in common parlance, the 'fixer'. His approach to the Sachs case was to ingratiate himself with high government officials by any means which would bring about a favorable result for his client. He was not a tax lawyer and knew that he had no defense in the Sachs tax fraud, although for a time he did urge a wholly unsupported contention that there had been a voluntary disclosure. He was the arch conspirator in the scheme and plan condemned by the jury in its verdict against these defendants. He is an admitted perjurer. His motives from the beginning were venal and corrupt. No other explanation can be made for his purchase of the oil royalties for the two top government officials with whom he was dealing. It is simply incredible that the offering of the fragmentary deposition testimony of this discredited witness in support of the defendants' alleged innocence could possibly have the weight and effect of producing an acquittal for these defendants, or either of them. In fact, they would have a far better opportunity to obtain a favorable verdict from a jury without attempting to utilize as a crutch the aid of one whose alignment with them could have no other effect than to poison the minds of a jury against

them. I have a strong conviction that the motions for a new trial on the ground of the newly discovered evidence of Schwimmer is merely a vehicle utilized by the defendants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal. It seems inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury."

We have not attempted to reproduce the testimony embodied in the deposition of Schwimmer. We have, however, examined it with great care and we are familiar with the record embodying the testimony produced on the trial of this case, having twice reviewed it. From the knowledge thus gained we are of the view that the trial court properly evaluated it and that there was no abuse of its judicial discretion in denying the motion for new trial on the ground of newly discovered evidence. The order appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals Eighth Circuit.

(JUDGMENT.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213—September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle,

Appellants,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

November 9th, 1959.

(ORDER DENYING PETITION OF APPELLANT, MATTHEW J. CONNELLY, FOR REHEARING.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213—September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle, Appellants,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

The Petition for Rehearing filed by the appellant, Matthew J. Connelly, in this cause, having been considered by this Court, it is now here Ordered that the same be, and it is hereby, denied.

December 14, 1959.

(ORDER DENYING PETITION OF APPELLANT, T. LAMAR CAUDLE, FOR REHEARING.)

United States Court of Appeals for the Eighth Circuit.

No. 16,213. September Term, 1959.

Matthew J. Connelly and T. Lamar Caudle, Appellants, vs. United States of America.	Appeal from the United States District Court for the Eastern District of Missouri.

The Petition for Rehearing, filed by the appellant, T. Lamar Caudle, in this cause, having been considered by

this Court, it is now here Ordered that the same be, and it is hereby, denied.

December 14th, 1959.

Supreme Court of the United States.

No. ..... October Term, 1959.

Matthew J. Connelly and
T. Lamar Caudle

Petitioners,

v.

United States.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 12th, 1960.

(s) Hugo L. Black,
Associate Justice of the Supreme
Court of the United States.

Dated this 29th day of December, 1959.